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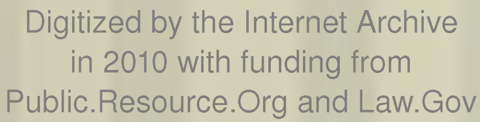
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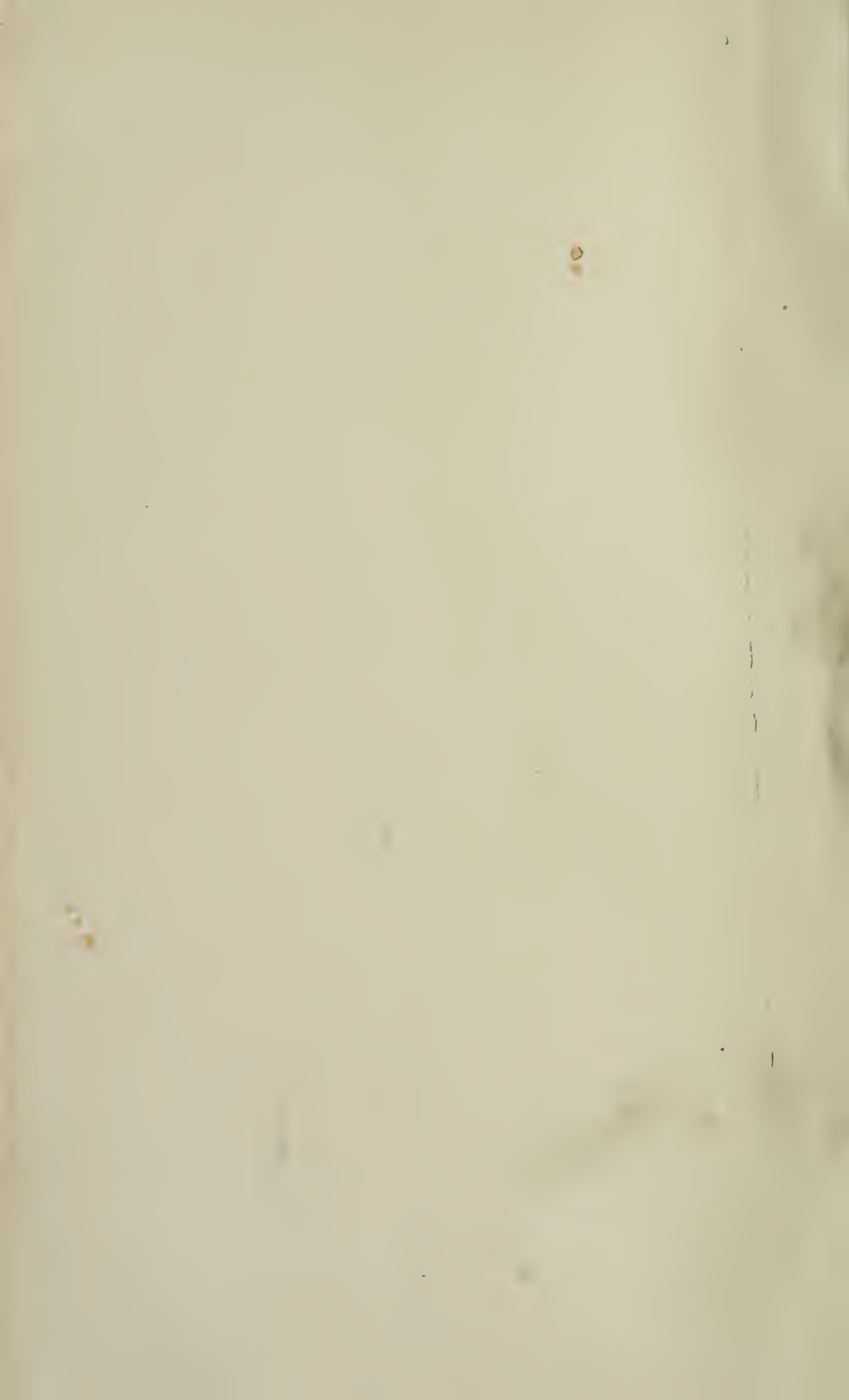

No. 191.

UNITED STATES

IRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

ccidental & Oriental Steamship Company (A Corporation),

Appellant,

vs.

nry F. Smith, et al.,

Appellees.

peal from the District Court of the United States for the Northern District of California.

Transcript of Record.

ARMSTRONG & DE GUERRE, PRINT, 404 MONTGOMERY STREET, S. F.

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Court of Appeals

33

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

OCCIDENTAL AND ORIENTAL STEAMSHIP COMPANY,
a Corporation,
Appellant,

vs.

HENRY F. SMITH ET AL,
Appellees.

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UNITED STATES OF AMERICA, ss:

The President of the United States:

To Henry F. Smith, George C. Smith, infants, and Eliza A. Smith, their guardian, to Eliza A. Smith and to Eliza A. Smith as Administratrix of the Estate of Henry Smith, deceased, and to Clinton L. White and W. H. Cobb, their proctors,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 29th day of August next, pursuant to an order allowing an appeal, filed in the Clerk's Office of the District Court of the United States, for the Northern District of California, wherein the Occidental and Oriental Steamship Company is the appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in the said decree mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William W. Morrow, Judge of the United States District Court for the Northern District of California, this 31st day of July, A. D. 1894.

WM. W. MORROW,

U. S. District Judge.

Service of the within citation, by copy, admittted this 31st day of July, 1894.

CLINTON L. WHITE and WM. H. COBB,

Proctors for Appellees.

Endorsed: Filed July 31st, 1894.

SOUTHARD HOFFMAN, Clerk.

In the District Court of the United States in and for the Northern District of California.

HENRY F. SMITH AND GEORGE C. SMITH, Infants, by Eliza A. Smith, their Guardian, and Eliza A. Smith. for herself and as Administratrix of the estate of Henry Smith, Deceased.
Plaintiffs,

vs.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY, a corporation, AND PACIFIC COAST STEAMSHIP COMPANY, a corporation,
Defendants.

Plaintiffs complain against defendants, and for cause of action against them allege:

I.

That plaintiffs, Henry F. Smith and George C. Smith, are infants, under the age of fourteen years, residents of the county of Sacramento, State of California, and that on the 15th day of August, 1890, in the Superior Court of the county of Sacramento, State of California, upon due proceedings had and notice given, the plaintiff, Eliza A. Smith, was appointed guardian of said infant plaintiffs, and duly qualified as such guardian, and letters of guardianship of said infant plaintiffs, were duly issued to her by

said Superior Court, under the seal thereof, which letters have not been revoked, and ever since said time plaintiff, Eliza A. Smith, has been and now is, the duly appointed, qualified and acting guardian of said infant plaintiffs.

II.

That the infant plaintiffs herein are children, and the plaintiff, Eliza A. Smith, is the surviving wife of Henry Smith, deceased, hereinafter mentioned, the plaintiffs are the next of kin and only heirs at law of said Henry Smith, deceased.

That said Henry Smith was a resident of the County of Yolo, State of California, at the time of his death, and that he died intestate, and on or about the ——-day of October, 18‑8, upon due proceedings had and notice given, plaintiff, Eliza A. Smith, was by an order of the Superior Court of the County of Yolo, State of California, duly appointed administratrix of the Estate of said Henry Smith, deceased, and said plaintiff thereupon duly qualified as such adminstratrix, and letters of Administration of the Estate of said Henry Smith, deceased, were thereupon duly issued to her by said Supreme Court, which letters have not been revoked, and ever since said time plaintiff, Eliza A. Smith, has been and now is the duly appointed, qualified and acting Administratrix of the Estate of Henry Smith, deceased.

III.

That the defendant, Occidental and Orriental Steamship Company, is a corporation, duly organized and incorporated for the purpose of, and was at all the times herein

mentioned and still is conducting business as a common carrier, engaged as such in running lines of steamship and carrying passengers thereon for hire between the port of San Francisco, in California, and other ports of the Pacific Ocean, and at all times herein mentioned was and still is the proprietor of a certain steamship named the "Oceanic," which is employed by said defendant in making voyages, carrying passengers, between San Francisco and Yokohoma.

IV.

That defendant, Pacific Coast Steamship Company, is a corporation duly organized and incorporated for the purpose of and was at all times herein mentioned, and still is, conducting business as a common carrier, engaged as such in running lines of steamships and carrying passengers thereon for hire between the Port of San Francisco, in California, and other ports of the Pacific Ocean, and up to the time of the sinking and loss of said steamship, on August 22nd, 1888, as hereinafter set forth, was the proprietor of a certain steamship named the "City of Chester," which was employed by said defendant in making voyages, carrying passengers for hire on the Pacific Ocean, between San Francisco, California, and Eureka, California.

V.

That on the 22nd day of August, 1888, at San Francisco, California, the defendant, the Pacific Coast Steamship Company, received Henry Smith on board its said steamship "City of Chester," for the purpose of conveying him, said Henry Smith, as a passenger on said steamship from San Francisco to Eureka, California, for the price

charged by said defendant therefor and which the said Henry Smith paid to the said defendant in advance.

VI.

That defendants herein, on said 22nd day of August, 1888, so negligently, unskillfully and wrongfully conducted themselves and so misbehaved in the management of their respective steamships, the "Oceanic" and the "City of Chester," that, through the gross negligence, unskillfulness and wrongful acts of detendants, their respective agents, servants and employees, the said two steamships, the "City of Chester" and the "Oceanic" were caused to collide and strike together, at or near the entrance to the harbor of San Francisco, and within less than three miles from the shore, and thereby, and through the gross negligence, unskillfulness and wrongful acts of defendants, their respective agents, servants and employees, said steamship, the "City of Chester" was caused immediately to sink beneath the waters, and was wholly lost, and the said Henry Smith who was, as aforesaid, a passenger on board said steamship, was carried down with said steamship beneath the waters, and thereby, and without any fault or negligence on his part, but solely through the gross negligence, unskillfulness, and wrongful acts of defendants, their respective agents, servants and employees, was drowned and deprived of his life.

VII.

That said Henry Smith was, at the time of his death, of the age of about thirty-two years, was in perfect health, intelligent, well educated, industrious, of good habits, a kind and loving husband and father, providing well for

his family, of good business ability, and had every prospect before him of a long, useful and prosperous life, and plaintiffs herein were dependent upon and were actually supported by him, and they have, by his said death, suffered damages in the full sum of seventy-five thousand dollars.

VIII.

That plaintiffs have been further specially damaged in the sum of two hundred and seventy-five dollars, necessarily laid out and expended by them in bringing the body of said Henry Smith from San Francisco to Sacramento, the place of burial thereof, and for procuring a cemetery lot, and for the necessary funeral expenses of said Henry Smith.

Wherefore, plaintiffs pray judgment against defendants for seventy-five thousand two hundred and seventy-five dollars, and costs of suit.

CLINTON L. WHITE,
Attorney for Plaintiffs.

STATE OF CALIFORNIA,
County of Sacramento. } ss.

Eliza A. Smith, being first duly sworn, says that she is one of the plaintiffs in the above entitled action. That she has heard the foregoing complaint read, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated on information or belief, and as to those matters she believes it to be true.

ELIZA A. SMITH.

Subscribed and sworn to before me this 16th day of August, 1890.

[seal.] Clinton L. White,
Notary Public.

[Endorsed.] Filed August 19th, 1890.
Southard Hoffman,
Clerk.

By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

HENRY F. SMITH AND GEORGE C. SMITH, INFANTS, BY ELIZA A. SMITH, their Guardian, and ELIZA A. SMITH for Herself and as Administratrix of the Estate of Henry Smith, Deceased, Plaintiff, vs. OCCIDENTAL AND ORIENTAL STEAMSHIP COMPANY, a Corporation, and the PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Defendant.	No. 257.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

GREETING:

To the Occidental and Oriental Steamship Company, a Corporation, and Pacific Coast Steamship Company, a Corporation, Defendants.

You are hereby required to appear in an action brought against you by the above named plaintiff, in the District Court of the United States for the Northern District of California, and to file your plea, answer or demurrer to the complaint filed therein, in the office of the Clerk of said Court in the City and County of San Francisco within ten days (exclusive of Sundays and day of service) after

the service on you of this summons—if served in this county; or if served out of this county, then within thirty days—or judgment by default will be taken against you.

The said action is brought to recover seventy-five thousand two hundred and seventy five ($75,275) dollars damages and costs of suit, as will more fully and at large appear from the duly certified copy of complaint accompanying this summons; and if you fail to appear and plead, answer or demur, as herein required, judgment by default will be entered against you.

Witness, the Honorable Ogden Hoffman, Judge of said Court, this 19th day of August, in the year of our Lord one thousand eight hundred and ninety and of our Independence the one hundred and fifteenth.

(Seal.) Southard Hoffman, Clerk.

United States Marshal's Office, }
Northern District of California. }

I hereby certify that I received the within writ on the 20th day of August, 1890, and personally served the same on the 21st day of August, 1890, on Pacific Coast Steamship Company by delivering to and leaving with Geo. C. Perkins, who is a member of the firm of Goodall, Perkins & Co., managing agents of said Pacific Coast Steamship Company, said defendant named therein personally, at the City and County of San Francisco in said District, a certified copy thereof, together with a certified copy of the complaint, certified to by Southard Hoffman, Clerk of said Court, attached thereto.

W. G. Long, United States Marshal.
By P. H. Maloney, Deputy

SAN FRANCISCO, August 21st, 1890.

I hereby certify that I received the within writ on the 20th day of August, 1890, and personally served the same on the 20th day of August, 1890, on the Occidental and Oriental Steamship Company by delivering to and leaving with D. D. Stubbs, Secretary of said Occidental and Oriental Steamship Company, said defendant named therein, personally, at the City and County of San Francisco in said District, a certified copy thereof, together with a certified copy of the complaint certified to by Southard Hoffman, Clerk of said Court, attached hereto.

W. G. LONG, United States Marshal.
By P. H. MALONEY, Deputy.

SAN FRANCISCO, August 20th, 1890.

Endorsed: Filed August 21st, 1890.

SOUTHARD HOFFMAN, Clerk.

In the District Court of the United States, in and for the Northern District of California.

HENRY F. SMITH and GEORGE C. SMITH, Infants, by ELIZA A. SMITH, their Guardian, and ELIZA A. SMITH, for herself and as Administratrix of the Estate of HENRY SMITH, deceased. Plaintiffs. vs. OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY, a Corporation, and PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Defendants.	

Now comes the defendants, the Occidental and Oriental Steamship Company, and demurs to the complaint of the plaintiffs in the above entitled action, and for cause of demurrer alleges and shows to the Court as follows:

That there is a misjoiner of parties plaintiff in this.

1st. That the plaintiff or the personal representative to wit, the administratrix of the estate of Henry Smith, deceased, has brought this action under the provisions of section 377 of the Code of Civil Procedure of the State of California, and has in the same action united with her, as plaintiffs, the children of said deceased and herself individually, as the heirs and next of kin of said deceased, who have no right, title or interest in the subject matter of said action so brought by said administratrix, and no

standing in Court to maintain this action as co-plaintiffs with her.

2nd. That the plaintiffs, Henry F. Smith and George C. Smith, infants, by Eliza A. Smith, their guardian, and Eliza A. Smith (the children, widow, heirs at-law and next of kin of Henry Smith, deceased), have brought this action under the provision of section 377 of the Code of Civil Procedure of the State of California, and have in the same action united with them as plaintiff, Eliza A. Smith, administratrix of the estate of Henry Smith, deceased, as such administratrix. That said administratrix of said Henry Smith, deceased, has no right, title or interest in the subject matter of said action so brought by said heir-at-law and next of kin of said deceased, and no standing in Court to maintain this action as co-plaintiff with said heirs-at-law.

3rd. That the said complaint does not state facts sufficient to constitute a cause of action.

4th. That several causes of action have been improperly united in said complaint, to wit: A cause of action belonging to Eliza A. Smith, administratrix of the estate of Henry Smith, deceased, against the defendants and a cause of action belonging to the heirs-at-law and next of kin of Henry Smith, deceased, against said defendants.

5th. That said complaint is ambiguous, unintelligible and uncertain; in this, it is impossible to determine from said complaint whether said action is an action sought to be maintained by the heirs-at-law and next of kin of Henry Smith, deceased, against the defendants, or is an action sought to be maintained by Eliza A. Smith, admin-

istratrix of the estate of Henry Smith, deceased, against the same defendant. That all said parties cannot jointly maintain this action. That the plaintiffs in such an action must be either the heirs-at-law or the personal representative of the person, not being a minor, whose death is alleged to have been caused by the wrongful act or neglect of another, and that both cannot unite in an action for the same cause of action under the provisions of section 377 of the Code of Civil Procedure of the State of California.

Wherefore, defendant demands that the prayer of said complaint may be denied, and that it have and recover of plaintiffs its costs herein incurred.

W. H. L. BARNES,

Attorney for Defendant, Occidental and Oriental Steamship Co.

State of California,
City and County of San Francisco. } ss.

W. S. Hinkle, being duly sworn, deposes and says that he is managing clerk for W. H. L. Barnes the attorney of record for the Occidental and Oriental Steamship Company, one of the defendants in the above entitled action, and that the said W. H. L. Barnes resides and has his office at the City and County of San Francisco, State of California; that Clinton L. White is the attorney of record for the above named plaintiffs in said cause, and that he, said Clinton L. White has his office at Rooms 10 and 11, Sutter Building, Sacramento, Sacramento county, in said State; that in each of said two places there is a United States postoffice, and between said two places there is a regular daily communication by mail; that on the 27th day of

August, 1890, deponent served a true copy of the foregoing demurrer in said action on said Clinton L. White, the said attorney for said plaintiffs, by depositing such copy of demurrer of said date in the postoffice at said City and County of San Francisco, properly enclosed in an envelope, addressed to said Clinton L. White, attorney-at-law, at Rooms 10 and 11, Sutter Building, Sacramento, Sacramento county, where said attorney has his office, and prepaying the postage thereon.

W. S. HINKLE.

Subscribed and sworn to before me, this 27th day of August, 1890.

(Seal.) GEO. T. KNOX,
Notary Public.

Endorsed: Filed Aug. 27th, 1890.

SOUTHARD HOFFMAN,
Clerk.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the Court Room, in the City of San Francisco, on Thursday, the 29th day of January, in the Year of our Lord One Thousand Eight Hundred and Ninety-One.

PRESENT:—

The Honorable WM. W. MORROW, Judge.

HENRY F. SMITH, ET AL.,
vs.
THE OCCIDENTAL AND ORIENTAL STEAMSHIP COMPANY.
} No. 257.

In this cause the demurrer to the complaint herein having

been submitted to the Court for consideration and decision; now after due consideration had thereon, it is by the Court ordered that the said demurrer be and the same is hereby overruled with leave to the defendants to answer within twenty days.

In the District Court of the United States, in and for the Northern District of California.

Henry F. Smith and George C. Smith, Infants, by Eliza A. Smith, their Guardian, and Eliza A. Smith for Herself and as Administratrix of the Estate of Henry Smith, Deceased,

Plaintiffs,

vs.

Occidental and Oriental Steamship Company, a Corporation, and the Pacific Coast Steamship Company, a Corporation,

Defendants.

Now comes the Occidental and Oriental Steamship Company, one of the defendants in the above entitled action, and makes its separate answer to the complaint of the plaintiffs herein, and alleges and shows to the Court as follows:

I.

The defendant has no knowledge or belief sufficient to enable it to answer the allegations contained in Paragraph I of said complaint, and therefore and on that ground denies the said allegations and each and every of them.

II.

Defendant has no knowledge or belief sufficient to enable it to answer the allegations contained in Paragraph II of said complaint, and therefore and on that ground denies the said allegations and each and every of them.

III.

Defendant admits the allegations contained in Paragraph III of said complaint.

IV.

Defendant has no knowledge or belief sufficient to enable it to answer the allegations contained in Paragraph IV of said complaint, and therefore on that ground denies the said allegations and each and every of them.

VI.

The said defendant denies that on the 22d day of August, 1888, or at any other time, it negligently, unskillfully or wrongfully conducted itself separately or in conjunction with the steamship "City of Chester" or so or at all misbehaved itself in the management of said steamship "Oceanic," or either by itself, or in connection with the said "City of Chester," or at all, that through the gross or other negligence, unskillfulness or wrongful acts of the said defendant, either

by itself or in connection with said co-defendant, or its agents, servants or employees, the said two steamships, the "Oceanic" and the "City of Chester," were caused to collide and strike together at or near the entrance to the harbor of San Francisco, or elsewhere, or within less than three miles from shore, or any other distance, or thereby or through the gross or any negligence, unskillfulness, or wrongful or other acts of this defendant, its agents, servants or employees, either separately or in connection with its co-defendant, or its respective agents, servants, employees, the said "City of Chester" was caused immediately or at all, or ever, to sink beneath the waters, or was lost, or the said Henry Smith was carried down with said steamship beneath the waters, or thereby, or without any fault or negligence on his part, or solely, or at all, through the gross or any negligence, unskillfulness or wrongful or other acts of said defendant, its agents, servants or employees, either separately or in connection with its co-defendant, or its agents, or servants, or employees, said Henry E. Smith was drowned or deprived of his life.

And this defendant further answering the allegations contained in Paragraph VI of said complaint alleges, that on the day and year on that behalf alleged in the complaint, it was in possession of and operating upon a steamship route between San Francisco and Yokohama, the steamship "Oceanic." That said steamship was in all respects well found, equipped and manned, and in every respect fit and suitable for the voyage upon which she was then engaged. That on said day the steamship "Oceanic" was approaching the port of San Francisco under charge of a competent pilot, and proceeded with all proper care

and circumspection to enter the harbor or port of San Francisco. That at the time of her so entering said port or harbor there was a light and variable fog on the Bay of San Francisco, sometimes lifting so that the sight was comparatively unobscured, and at other times closing thickly down upon said steamship. That said steamship was slowed down to what is known as "dead slow," and lookouts were posted, and the ship steered in the track usually taken by inbound steamships. That while so carefully proceeding, and in the exercise of the utmost care and diligence, those on board of the "Oceanic" and in charge of her heard a steam whistle, which was instantly replied to by that on said steamship "Oceanic;" that thereafter, and while the engines of the said steamship "Oceanic" were put at "dead slow" and the steam whistle kept going at intervals of one minute, and at about 9:25 A. M., a vessel was observed off the starboard bow of the "Oceanic." That the pilot in charge of said "Oceanic" then ordered two blasts of the whistle, which is understood to mean, "I am starboarding," and the helm of the "Oceanic" was immediately put hard to starboard, and the said steamship "Oceanic" answered the helm at once. The vessel so signaled replied with two blast upon her whistle, which was understood to mean that the signal so given by the pilot of the "Oceanic" was understood, and the same signal was thereupon repeated. But for some reason the said "City of Chester" was not steered in accordance with said understanding, or failed to mind her helm. Thereupon the engines of the said steamship "Oceanic" were stopped and reversed to full speed astern, and thereafter the said steamships col-

lided, the stem of the "Oceanic" penetrating the port side of the "City of Chester" about forty feet from the bow. That every effort was made by the officers and crew of the said steamship "Oceanic" to save life, and ropes and buoys were thrown over and the boats of the "Oceanic" were promptly manned and lowered.

And defendant further alleges that said disaster occurred without any fault of any description on the part of those in charge of and controlling said steamship "Oceanic," and that after the occurrence of said disaster every effort which was possible under the circumstances was made to save the life of the said Henry Smith, as well as of those of all other persons on board of said vessel.

VII.

Defendant has no knowledge or belief sufficient to enable it to answer the allegations contained in Paragraph VII of said complaint, and therefore and on that ground denies the said allegations and each and every of them. And the defendant denies that by reason of any act or omission of the defendant, the Occidental and Oriental Steamship Company, the plaintiffs suffered damages in the full sum of seventy-five thousand ($75,000) dollars or any other sum whatever.

VIII.

Defendant has no knowledge or belief sufficient to enable it to answer the allegations contained in Paragraph VIII of said complaint, and therefore and on that ground denies the said allegations and each and every of them.

And the defendant denies that by reason of any act or

omission of the defendant, the Occidental and Oriental Steamship Company, the plaintiffs have been specially damaged in the sum of two hundred and seventy-five ($275) dollars or any other sum whatever.

Wherefore the defendant, the Occidental and Oriental Steamship Company, one of the defendants as aforesaid, demands judgment in its favor against said plaintiffs and each of them, and for its costs and disbursements made in defending this action.

W. H. L. BARNES,
Attorney for O. & O. S. S. Co.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

D. D. Stubbs, being duly sworn, deposes and says that he is an officer of the above named defendant corporation, to wit: The Secretary thereof; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

D. D. STUBBS.

Subscribed and sworn to before me, this 13th day of February, 1891.

[Seal.]

E. B. RYAN,
Notary Public.

Endorsed: Filed February 18th, 1891.

SOUTHARD HOFFMAN,
Clerk.

In the District Court of the United States in and for the Northern District of California.

HENRY F. SMITH and GEORGE C. SMITH, Infants, by ELIZA A. SMITH, their Guardian, and ELIZA A. SMITH for herself and as Administratrix of the Estate of HENRY SMITH, deceased,
Plaintiff,
vs.
OCCIDENTAL AND ORIENTAL STEAMSHIP COMPANY, a Corporation, and PACIFIC COAST STEAMSHIP COMPANY, a Corporation,
Defendants,

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

John W. Cathcart, of said City and County, being duly sworn, says he is a male citizen of the United States, over eighteen years of age, and not a party to the above entitled action.

That on the 16th day of February, 1891, he deposited in the United States Postoffice, at the city of San Francisco, aforesaid, a true copy of the answer of the defendant, the Occidental and Oriental Steamship Company, in the above entitled action, directed to Clinton L. White, the attorney of record of the above named plaintiff, at the city

of Sacramento, State of California, Rooms Nos. 10 to 11, Sutter Building, the same being the place of his residence and office. And that there is a regular communication by the United States Mails from said Postoffice of deposit thereof, as aforesaid, to said Clinton L. White's said place of residence and office.

JOHN W. CATHCART.

Subscribed and sworn to before me, this 18th day of February, 1891.

[Seal.] JOHN COFFEE,
Notary Public.

Endorsed: Filed February 18th, 1891.

SOUTHARD HOFFMAN,
Clerk.

In the District Court of the United States, in and for the Northern District of California.

Hon. W. W. MORROW,
Judge.

Henry F. Smith, Et Al, Plaintiffs, vs. The Occidental and Oriental Steamship Company, Defendants.	No. 257.

Eliza A. Smith, Plaintiff, vs. The Occidental and Oriental Steamship Company. Defendants.	No. 258.

Monday, Sept. 4th, 1893.

In these causes it is stipulated and agreed between counsel for the respective parties Plaintiffs and Defendants, in open Court, that these actions, and each of them, are and is a proceeding in admiralty in personam, all objections or exceptions to form of summons, or citation, or objections to pleadings, as not being in acccordance with the admiralty rules and practice of this Court, are and is hereby waived, and that the cause may be tried and determined

in the same manner, and with the same effect as if citation had been issued in each case, instead of summons, and the proceedings were in all respects conformable to the rules of this Court in admiralty.

Mr. White of counsel for plaintiff in each case now, in open Court, demands that the same be tried by Jury.

Messrs. Barnes and Shay, representing the Defendants, object upon the ground that these being causes in admiralty and not at common law, the Plaintiff's have no right, and the Court has no power to award a trial by Jury.

The Court sustained the objection, stating that the Court had no authority in an admiralty case, to award a trial of a case by a Jury, and ordered that the trial of the causes proceed before the Court on Thursday next, September 7th, without a Jury.

Mr. White takes an exception to the ruling of the Court.

It is hereby stipulated in open Court that the above causes shall be tried at the same time, and upon the same evidence, so far as the same is applicable, and that each party have the benefit in each case, of all objections and exceptions taken upon the trial, and that the Court may award separate judgments in the cases.

[Endorsed]: Filed September 7th, 1893.

SOUTHARD HOFFMAN, Clerk.
By J. S. Manley, Deputy Clerk.

At a stated meeting of the District Court of the United State of America, for the Northern District of California, held at the Court-room, in the city of San Francisco, on

Thursday, the 7th day of November, in the year of our Lord, one thousand eight hundred and ninety-three.

Present:

The Honorable WM. W. MORROW, Judge.

HENRY F. SMITH ET AL.,
vs.
THE OCCIDENTAL & ORIENTAL STEAMSHIP CO. } No. 10,732.

and

ELIZA A. SMITH,
vs.
THE OCCIDENTAL & ORIENTAL S S. CO. } No. 10,733.

These causes as consolidated for the purpose of trial, this day came on for hearing, C. L. White, Esq. and W. H. Cobb, Esq., appearing as proctors for libellants, and W. H. L. Barnes, Esq., and Frank Shay, Esq., as proctors for respondent; and on motion of Mr. White, it is ordered that the libellants be, and they are hereby permitted to amend their libel in case No. 10,732, by striking out paragraph 8 thereof. Mr. White then stated the case of the libellant to the Court and Mr. Barnes stated the case for respondent. Mr. White called Louis Mayer and John Metcalfe, who were duly sworn and examined as witnesses on behalf of the libellants, and pending the examination of Mr. Metcalfe, the further hearing hereof was continued until Friday, September 8, 1893.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the Court-room, in the city of San Francisco, on

Tuesday, the 12th day of September, in the year of our Lord, one thousand eight hundred and ninety-three.

Present:

The Honorable WM. W. MORROW, Judge.

HENRY F. SMITH, ET AL.,
vs.
OCCIDENTAL & ORIENTAL S. S. Co. } No. 10,732.

and

ELIZA A. SMITH,
vs.
OCCIDENTAL & ORIENTAL S. S. Co. } No. 10,733.

These causes as consolidated for the purposes of trial, this day came on regularly for further hearing, C. L. White, Esq., and W. H. Cobb, Esq., appearing as proctors for the libellants, and W. H. L. Barnes, Esq., and Frank Shay, Esq., as proctors for the respondent. The examintion of John Metcalfe, a witness on behalf of the libellants, was resumed and concluded. And Mr. White called David Franklin Cookson, Charles McCallom, Thomas Wallace, Rufus Comstock, John Lundine, James J. Loggie, James Rankin and Ferdinand Westdahl, who were duly sworn and examined as witnesses on behalf of the libelants; and thereupon, the further hearing hereof was continued until Wednesday, September 13, 1893.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the Court room in the City of San Francisco,

on Wednesday, the 13th day of September, in the year of our Lord one thousand eight hundred and ninety-three.

Present:

The Honorable WM. W. MORROW, Judge.

HENRY F. SMITH, ET AL.,
vs.
OCCIDENTAL & ORIENTAL S. S. Co. } No. 10,732.

and

ELIZA A. SMITH,
vs.
OCCIDENTAL & ORIENTAL S. S. Co. } No. 20,733.

These causes, as consolidated for the purposes of trial, this day came on regularly for further hearing, C. L. White, Esq., and W. H. Cobb, Esq., appearing as proctors for the libellants, and W. H. L. Barnes, Esq., and Frank Shay, Esq,, as proctors for the respondent. Mr. White recalled Thomas Wallace, who was further examined as a witness on behalf of the libellants, and called Mrs. Eliza A. Smith, E. S. Talbot, Clitus Barbour, Mrs. Sarah Nye and S. M. Marks, who were duly sworn and examined as witnesses on behalf of the libelants and rested. Mr. Barnes called George T. Tilston, Thos. P. H. Whitelaw, George E. Bridget, William Allen, Thomas Mirk, A. B. Brolly, James Swan, Henry A. M. McLaughlin and John McDonald, who were examined as witnesses on behalf of the respondent, and rested. And thereupon the further hearing hereof was continued until Thursday, September 14th, 1893.

At a stated term of the District Court of the United States of America, for the Northern District of Califor-

nia, held at the Court room in the City of San Francisco, on Thursday, the 14th day of September, in the year of our Lord one thousand eight hundred and ninety-three.

Present:

The Honorable WM. W. MORROW.

HENRY F. SMITH, ET AL., vs. OCCIDENTAL & ORIENTAL S. S. CO.	No. 10,732.

and

ELIZA A. SMITH, vs. OCCIDENTAL & ORIENTAL S. S. CO.	No. 10,733.

These causes, as consolidated for the purposes of trial, this day came on regularly for further hearing, C. L. White, Esq., and W. H. Cobb, Esq., appearing as proctors for libellants, and W. H. L. Barnes, Esq., and Frank Shay, Esq., as proctors for the respondent. The testimony being announced closed, the causes were argued by Mr. White for the libellants and Mr. Barnes on behalf of the respondent and submitted to the Court for consideration and decision.

In the District Court of the United States, in and for the Northern District of California.

HON. W. W. MORROW, Judge.

HENRY F. SMITH, ET AL, Plaintiffs, vs. THE OCCIDENTAL AND ORIENTAL STEAMSHIP COMPANY, Defendants.	No. 257.

ELIZA A. SMITH, Plaintiff, vs. THE OCCIDENTAL AND ORIENTAL STEAMSHIP COMPANY, Defendants.	No. 258.

MONDAY, Sept. 4th, 1893.

In these causes it is stipulated and agreed between counsel for the respective parties Plaintiffs and Defendants, in open Court, that these actions, and each of them, are and is a proceeding in admiralty in personam, all objections or exceptions to form of summons, or citation, or objections or exceptions to form of summons, or citation, or objections to pleadings, as not being in accordance with the admiralty rules and practice of this Court, are and is hereby waived, and that the causes may be tried and determined in the same manner, and with the same effect as if citation had

been issued in each case, instead of summons, and the proceedings were in all respects conformable to the rules of this Court in admiralty.

Mr. White, of counsel for Plaintiff in each case now, in open Court, demands that the same be tried by Jury.

Messrs. Barnes and Shay, representing the Defendants, object upon the ground that these being causes in admiralty, and not at common law, the Plaintiffs have no right, and the Court has no power to award a trial by Jury.

The Court sustained the objection, stating that the Court had no authority in admiralty case, to award a trial of a case by a Jury, and ordered that the trial of the causes proceed before the Court on Thursday next, September 7th, without a Jury.

Mr. White takes exception to the ruling of the Court.

It is hereby stipulated in open Court that the above causes shall be tried at the same time, and upon the same evidence, so far as the same is applicable, and that each party have the benefit in each case, and all objections and exceptions taken upon the trial, and that the Court may award separate judgments in the cases.

In the District Court of the United States in and for the Northern District of California.

HON. W. W. MORROW, Judge.

HENRY F. SMITH, ET AL., Plaintiffs. vs. THE OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY, Defendants.	No. 257.

ELIZA A. SMITH, Plaintiff. vs. THE OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY, Defendant.	No. 258.

THURSDAY, September 7th, 1893.

APPEARANCES.

Clinton L. White and William H. Cobb, Esqs, appeared for the plaintiffs.

W. H. L. Barnes, Esq., and Frank Shay, Esq., appeared for the defendants.

This cause now came on in its regular order on the calendar before the Court, and the following proceedings were had:

THURSDAY, September 7th, 1893.

The Court—This case of H. F. Smith has been consolidated with that of Eliza A. Smith.

Mr. Barnes– It is agreed that both cases may be tried together.

The Court—I think it will be proper that you gentlemen have a copy of the stipulation, which was entered into on last Monday or Tuesday, filed with the Clerk of the Court because there is a transfer of that case from the common law side of the Court to that of the admiralty side of the Court.

Mr. Barnes—The reporter, Mr. Bennett, has that stipulation in his notes, and we will get a transcript of it and file it in accordance with your Honor's suggestion.

The Court—Proceed, Mr. White.

Mr. White—May it please the Court, before commencing the trial of these cases, I desire in the case No. 257, to ask leave of the Court to strike from the complaint, paragraph 8, which is as follows (reads said paragraph); not that it contains matter that we cannot prove, and I find that a demurrer as to misjoinder has been overruled, but upon examination of the authorities I feel some uncertainty about this, and I prefer, rather than have anything of this kind in the case, to abandon entirely the claim for this $275, and I ask therefore that this order be entered: "On motion of plaintiffs it is ordered that the plaintiffs be, and they are hereby, permitted to amend their complaint herein by striking out paragraph 8 thereof."

The Court—Let that order be entered.

Mr. Barnes—Before you open the case, I will make some admissions of fact that will save time both to the

counsel and to the Court, and I will ask the reporter to note that the claimants or defendant herein admits certain facts in this case.

The Occidental and Oriental Steamship Company, the corporation defendant in the case of Henry F. Smith and George C. Smith, infants, by Eliza A. Smith, their guardian, and Eliza A. Smith for herself as administratrix of the estate of Henry Smith, deceased, plaintiffs, vs. The Occidental and Oriental Steamship Company, a corporation, and the Pacific Coast Steamship Company, a corporation, defendant, admit the following facts:

First—That the plaintiffs, Henry F. Smith and George C. Smith are infants, and were at the time of the commencement of this action under the age of 14 years, residents of the County of Sacramento, State of California; and that on the 15th day of August, 1890, in the Superior Court of the County of Sacramento, State of California, upon due proceedings had and notice given, the plaintiff, Eliza A. Smith, was appointed guardian of the said infant plaintiffs, and duly qualified as such guardian, and letters of guardianship on said infant plaintiffs were duly issued to her by said Superior Court, under the seal thereof, which letters have not been revoked, and ever since the said plaintiff, Eliza A. Smith, has been and now is duly appointed, qualified and acting guardian of said infant plaintiffs.

Second—That the infant plaintiffs herein are the children of the plaintiff Eliza A. Smith, as the surviving wife of Henry Smith, deceased, herein mentioned, and the said plaintiffs are the next of kin and the only heirs at law of said Henry Smith, deceased; that said Henry Smith was

a resident of the County of Yolo, State of California, at the time of his death, and that he died intestate, and that in the month of October, 1888, upon due proceedings had and notice given, the plaintiff Eliza A. Smith was, by order of the Superior Court of the County of Yolo, State of California, duly appointed administratrix of the estate of said Henry Smith, deceased; and that the plaintiff thereupon duly qualified as such administratrix, and letters of administration of the estate of said Henry Smith, deceased, were duly issued to her by the Superior Court, which letters have not been revoked; and that since that time the plaintiff Eliza A. Smith has been and now is the duly appointed, qualified and acting administratrix of the estate of Henry Smith, deceased.

Third—That the defendant, the Occidental and Oriental Steamship Company, is a corporation duly organized and incorporated for the purposes stated in the complaint; that at the time of the disaster which forms the basis of this proceeding, the company named was in possession of and had control of and operated the said ship "Oceanic," and that said steamship was employed by the corporation at the time alleged in the complaint, to-wit, on the 22d day of August, 1888, and was engaged in the transportation of passengers for hire between the port of San Francisco, State of California, United States of America, and Yokohama, Japan, and Hong Kong, China. I may say here that the defendant is not the owner of the steamship. It is the lessee of the steamship, and hires and charters the steamship from the owners of it, the White Star Company, but it is connected for the purpose of this action, or

for any relief that the plaintiffs may be entitled to, that we are responsible and *de facto* the owners of the ship.

It is admitted that the Pacific Coast Steamship Company was, at the time of this disaster, a corporation duly organized and incorporated for the purpose of carrying on the business of a common carrier of passengers by sea, for hire, and was on that day the owner of the steamship "City of Chester," and that steamship was employed under the laws of the United States in the coastwise trade, running principally between the port of San Francisco and the port of Eureka. We also admit that on the 22nd day of August, 1888, Henry Smith, the deceased husband of Mrs Eliza Smith and the father of these infant plaintiffs, was a passenger on board said "City of Chester," for hire, to be carried from the port of San Francisco to the port of Eureka, and that he paid his fare and was entitled to all the privileges, immunities and relief of a passenger in a case of this character.

Now, in the second case, No 258, in the suit of Eliza A. Smith against the Occidental & Oriental Steamship Company, a corporation, and the Pacific Coast Steamship Company, a corporation, the defendant concedes the following facts: That the defendant, the Occidental and Oriental Steamship Company is a corporation, and was on the 22d day of August, 1888, engaged in the business of a common carrier of passengers between the port of San Francisco, California, United States of America, and the ports of Yokohama, Japan, and Hong Kong, China, and then was, and now is, responsible for any wrong, tort or misfeasance of its captain, pilot or other officers. We admit that the defendant, the Pacific Coast Steamship Company, was also

a corporation engaged in carrying passengers for hire in the the coastwise trade, under the laws of the United States, and was carrying passengers for hire at the time of this disaster on the Pacific Ocean, between the ports of San Francisco and Eureka; that on the 22d day of August, 1888, at San Francisco, the Pacific Coast Steamship Company received Myrta E. Smith on board of its steamship, the "City of Chester," for the purpose of conveying said Myrta Smith from San Francisco to Eureka, and that the fare of said Myrta E. Smith had been full paid to to that Company in advance. We admit that Myrta E. Smith, on the 22d day of August, 1888, was about the age of 15 years, and that both Henry E. Smith and Myrta E. Smith were among those who lost their lives, as the result of the collision between the steamship "City of Chester" and the steamship "Oceanic."

Mr. White—It seems hardly necessary, may it please the Court, for me to make any opening statement to your Honor in this case. It is two actions for damages against the Occidental and Oriental Steamship Company, and also against the other Company, the Pacific Coast Steamship Company, they causing the death by negligence, of Henry Smith, the husband of the plaintiff, Eliza A. Smith, and the father of the other two infant plaintiffs, and damages for the death of Myrta Smith, the daughter of the plaintiff, Eliza A. Smith. Some proceedings have been taken by the defendant, the Pacific Coast Steamship Company, under the Limited Liability Act, by which, I take it, that that defendant is practically no longer a party to this suit. I don't know exactly what order, if any, has been entered, or that any order has been entered, but as I understand

the law to be, they have given up their ship sunk in 50 fathoms of water, they were entitled to go free whether negligent or not.

Our contention will be here, and we expect to prove that the defendant—that the management of the steamship "Oceanic" was negligent. Whether or not the management of the "City of Chester" was negligent, is not a question that we care to decide. It is, perhaps, matter for the other side to be interested in. Of course after having proven or attempted to prove negligence in the management of the "Oceanic," we will furnish to your Honor some proof of the value of the lives of these two parties, as far as that matter is capable of being estimated.

Mr. Barnes—I propose now to open the case for the defendant. The opening of counsel for plaintiffs has, of course, furnished your Honor with no indication whatever, nor to the defendant any indication as to what they expect to show against the steamship "Oceanic." I suppose that counsel has taken that course for reasons which are satisfactory to himself. They are not, however, satisfactory to us, nor do I think they are satisfactory to your Honor, sitting as an admiralty Judge, because it seems to us that at the out set of the case, your Honor should understand something of the nature of this action, more than that it is a simple case to recover damages, and I take this occasion, with the permission of the Court, to open the case of the defendant, the Occidental and Oriental Steamship Company. Upon the right your Honor will see delineated upon the board a sketch showing the entrance of the harbor of San Francisco. This diagram is intended to show the entrance to the harbor of San Francisco. The top of the map is

North, the right is East, the left is West and seaward, and the bottom of the map is South. Upon it your Honor will see indicated the principal points on the Marin County side of the bay; where the pointer rests, is marked Bonita Point, and it is an important point in connection with the controversy here. Also Point Diablo, still further to the East on the Marin County side, and Lime Point. Upon the San Francisco side of the bay, the diagram commences by showing the position of the Cliff House, then passing around the point we come up to a buoy off Fort Point, and Fort Foint itself; then passing along as far as Black Point. The evidence will show to your Honor, that on the morning of the 22nd day of August, 1888, the steamship "Oceanic" was entering the port of San Francisco, coming from China and Japan with a crew of engineers and sailors, and about 1100 passengers. She was a propeller, four-masted, and the diagram to the right of the platform is a photograph of the steamship "Oceanic," which gives the Court a good idea of the general appearance of the ship, and it will be used in showing to the Court the positions of the officers and men on the morning as the ship was coming into port. She picked up her pilot somewhere in the neighborhood of what is known as "Whistling Buoy," a little after 8 o'clock or thereabouts; the morning was foggy; the fog lifted and settled again, so that at the time the view over the water was unobscured for a space of two miles or more, sometimes closing down so that one could see from the deck of the ship about a half mile. The view was never more open than for two miles, nor closed to a greater degree than half a mile; after the "Oceanic" had taken on board the pilot, he proceeded to take command

of the ship and gave his orders. She came in from the "whistling buoy," and as she was coming in she passed a four-masted British ship at anchor with a tug fastened to her, and the ship was then heaving her anchor, and the tug was getting ready to bring her into port. The ship and the tug was hailed and inquiries were made as to the state of the weather so far as the fog was concerned inside the bay.

The Court—This meeting took place outside?

Mr. Barnes—Yes, sir; at what place we will show your Honor on the map, at the 10-fathom buoy, and I will add that this tug boat that had gone out that morning took this four-masted ship in tow and followed in the wake of the "Oceanic" into the scene of the disaster, arriving there shortly after it occurred. Now, the steamer came in, as we contend, in strict compliance with the regulations established by the laws of the United States, and to which I will call your Honor's attention hereafter, proceeding with the utmost caution, and that becomes important in the case. This diagram to which I now call your Honor's attention, is an enlarged navigator's map of the port of San Francisco, enlarged by a photographic process. It shows, as your Honor is aware, with reference to this map, all the points, headlands, the soundings and depth of water of which use is made for the purpose of navigation. The black line indicates the course of the "Oceanic" on coming into the harbor. The buoy to which I called your Honor's attention or spoke of just now is marked in red ink "B." The four-masted British ship that was at anchor and of which I have spoken here was at this point (indicating).

Mr. White (interrupting)—What is that point marked on the map, please?

Mr. Barnes—"B." Now then, I say they hailed the tug and inquired concerning the weather inside, and the assurances were such that the "Oceanic" proceeded on her way. The British ship that was lying at anchor at this point had heaved her anchor, and the tug took her in tow and followed in after the "Oceanic," arriving shortly after the disaster upon its scene. From that point indicated by the letter "B" the steamship "Oceanic" was never at any time above half speed. She stopped repeatedly and started again, and when she reached a point opposite Point Bonita where the weather was so open that the point was plainly visible she went dead slow and proceeded only sufficiently fast to give her steerage way. The tide was flooding, going fast into the harbor, and with the tide she made just sufficient revolutions, as the engineers will explain to your Honor, to give her power to be properly steered and nothing more. She came up, as we contend, in accordance with the custom of the port or among pilots at all times, and particularly in heavy, thick weather, to the north of the channel, leaving the rest of the channel open for the passage of other vessels. As she came in thus slowly, sometimes at half speed, sometimes at dead slow, at all times under perfect command; her master and pilot were stationed at the bridge, which your Honor sees at the point where the pointer rests (indicating.) The bridge is an inclosed open space, which passes from side to side of the ship, representing a large, open platform. There is an opening or hatchway in which communication is had with

the steam gearing, which is operated by steam and is directly underneath this platform, so that the master and pilot, standing upon the bridge, can give their command to the men at the wheel—running the steam gearing with perfect ease and rapidity. The methods adopted for the purpose of communicating with the engine-room were of the most approved kind, and consisted of what is known as the telegraph. There were two of these telegraphs on the bridge of the "Oceanic," one on the port side and the other on the starboard side, so that without delay or without waiting—from either side of the bridge—communication could be had with the engine-room. This method of communication will be practically shown to your Honor, and it is one of the modern triumphs of naval engineering. Two of these dials, precisely like the ones exhibited here (indicating), were on the bridge of the "Oceanic," one on the port side and one on the other side, at all times under the control and command of the master or pilot. Upon the face of this dial your Honer will notice, first, in the center of the circle to the left is the word "astern," to the right the word "ahead." In the upper circle, rather at the top of the dial, the word "stop," then "slow," then "half speed," then "full speed astern." That is what that means on this side. On the other side is "going ahead"—as "going ahead slow," "go ahead half speed" and "full speed." We will show you that this apparatus is connected with the engine-room by means of this lever (indicating), and whenever this moved (indicating), the people in the engine-room were apprised simultaneously of the movement made upon the dial there. One of the engineers is stationed at this

telegraph in the engine-room, and when the signal is given by the captain or the pilot, who is steering on deck, it is instantly registered in the engine-room and recorded, and every time the ship makes a difference in the revolution of its engine or its propeller, that is to say, going ahead slow, then going ahead at half speed, going ahead at full speed, or to go back slow astern, half astern, full astern—whenever, I say, such change is made, it is registered immediately by this machine and communicated to the people in the engine-room. Such was the apparatus on board the "Oceanic" for the purpose of handling her. Every officer of that ship was at his post and on deck. The first officer was forward in this position here (showing), and it is a curious circumstance that this photograph happened to be taken before this disaster ever occurred, from Meiggs' wharf, by a snap-shot photograph, and with the same outfit that she had when the disaster occurred. In this case she is leaving port with the same men at their stations, and it is available for showing the way she came into port, because it was all just as it was, same men, same positions when she was leaving it. On the whaleback, as it is called, at the bow—so denominated, I believe, because it has an archy form and shape, for the purpose of shedding water; on the whaleback was the first mate and members of the crew on the lookout; here (indicating) was stationed another of the officers for the purpose of passing signals or words from the bridge to the officer on the whaleback, and again upon the bridge was stationed the captain of the ship, whom your Honor may possibly see indicated by that black dot there (indicating), and the pilot in a position nearer to the mast, indicated by the other figure, and

to the rear of him and of the mast was the second officer of the ship, holding in his hand a method of communication with the steam whistle, which is, as your Honor will see, just in front of the funnel and raised at a considerable height above the deck. Other officers, as your Honor will learn, were stationed at different portions of the ship from here to the stern. We shall show your Honor what the law of Congress required of a ship in the condition in which this was. I have marked on the outside of this monograph, Form No. 2,100 of the Government Printing Office at Washington, with which your Honor, doubtless, is entirely familiar, but for your convenience I have indicated upon the outside of the book which I will hand to your Honor for examination the different sections of the Act of Congress providing rules for sailing and steering vessels, and I will call your Honor's attention to Title 48, regulating commerce and navigation, Chapter 5, Navigation, Section 4233. The following rules for preventing collisions on the water shall be followed in the navigation of vessels of the Navy belonging to and of the mercantile marine of the United States: "Every steam vessel which is under sail and not under steam, shall be considered a sail vessel, and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel.

After providing for the lights at night, Rule 15 takes up the subject of fog signals, which is the subiect which specially interests us in this inquiry.

"Rule 15. Whenever there is a fog, or thick weather by day or night, fog signals shall be used as follows: Steam vessels under way shall sound the steam whistle

placed before the funnel not less than 8 feet from the deck, at intervals of not more than one minute."

We shall show your Honor that in compliance with the Revised Statutes, this ship was provided with the best quality and size of steam whistle, lifted above deck at a much greater height than the law required, and that connected with the whistle was a cord that went over the bridge, and that from the time the pilot got on board, before 8 o'clock, when this ship was well outside, Mr. Bridgert, the second officer of the "Oceanic," stood on the bridge with the line in his hand, and at intervals of less than one minute from that time, up to the time of the collision, sounded a protracted whistle, known as the fog signal.

Now I shall call your Honor's attention further to Rules 19, 20 and 21, to be found on page 36 of Form 2100 of the United States Government Printing Office at Washington, and I will read Rule 18, which reads: "If two vessels under steam are meeting end on, or nearly so, so as to involve risk of collision, the helm of both shall be put to port, so that each may pass on the port side of the other." Rule 19: "If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her starboard side, shall keep out of the way of the other." Rule 20. "If two vessels, one of which, a sail vessel, and the other a steam vessel, shall proceed in such direction as to involve risk of collision, the steam vessel shall be kept out of the way of the sailing vessel." Rule 21. "Every steam vessel when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse, and every steam vessel shall, when in a fog, go at

a moderate speed." In accordance with these rules, as I have stated, the "Oceanic" came in at dead slow from the time she got near Bonita Point, passing on at dead slow, sounding her fog whistle, and everybody on deck attending to duty. As she approached Lime Point she heard the whistle of the "Chester." She then gave the signals required by the regulations of the port, and which I may say are the same established among all nations for signals at sea, by international concurrence, as your Honor is well aware; that is to say, two ships signal which way they are going. A single signal, short and sharp, which is different from the protracted signal of fog or blowing the fog signal, a short, sharp whistle, indicates and conveys an idea. One whistle means, "Put your helm to port," and two, "Put your helm to starboard," or, "I am putting my helm to starboard, you do the same." Of course it is apparent what is going to happen when such a thing as that is done. I have here two specimens of naval architecture that would drive Irving Scott crazy, but I suppose they will answer purpose of this case, and I will say that these are about in the proportion of the two ships. The "Chester" was a steamer with a tonnage of something over 1100, and the "Oceanic" was between three and four thousand tons; the details of that we will give to your Honor. Now, these ships coming upon each other, the "Oceanic" gives the first signal—two short, sharp blasts upon the whistle, which mean, "I am starboarding my helm, you do the same;" thereupon the helm is put to starboard, and the ship goes away to the left. Of course, your Honor, it is foolish for me to talk about these things in this way, because you are a good deal better sailor than I ever thought

of being, as I know from experience, but I shall proceed as lawyers always do who think a Judge don't know anything, and tell the effect of the two whistles. Starboarding the helm throws the rudder to port, and she pays off to the left. The same proceeding is taken on the part of the other ship. He starboards his helm and that sends the rudder to port and she pays off in this direction (showing). Now, the "Oceanic" was, as we shall claim she was, coming in with full careful compliance with all the laws of navigation upon this subject. She was going dead slow. She was sounding her fog whistle. She was amply manned. Fitted with every appliance for safe navigation, in accordance with law. When she heard the whistle of this vessel, the "Chester," the fog whistle, she signaled "I am going to the left; you go to the left." The "City of Chester" answered, as we say, "All right; I am going to the left; I have put my helm to starboard, and we are both passing on the starboard side of each other, and everything is all right." In a moment or two they were in sight of each other about a half a mile away. The "Oceanic" was in the neighborhood of Lime Point, and coming in, as your Honor will see on this map (indicating). I have marked here the space "A" where the "Chester" was first heard.

The Court—That is where the "Oceanic" was when she first heard the "Chester"?

Mr. Barnes—Yes; of course, we don't know except by results where the "Chester" was, but we do know—as I will show to your Honor, that those who have stated her position differently from what we understand it to have been, are simply daft. As she came up, going, as I say, dead slow, giving this signal, it was answered from the

"Chester" by the same two short, sharp whistles, and in a moment she was in sight and about a half a mile away; between a half and a quarter of a mile away. The "Chester didn't seem to be going in the direction that her whistle said she was, and fearing that there might be some misunderstanding, the captain and pilot of the "Oceanic" repeated the signal—two sharp blasts, "We are hugging the shore going north as close as we can; you starboard your helm. You go to the left and we are all right." When they got to a point placed nearly opposite—I might say, in general terms, opposite Lime Point—the "Chester" was observed by these mariners not to be minding her helm at all, but to be acting as though she, instead of starboarding her helm, she had ported it, and the result was this, the "Chester," instead of as she came out of this space passing along this way, instead of starboarding her helm and going this way, she acted as though she had sent her helm in a directly opposite direction; at all events, she swung around as a sleigh will swing and slide, and didn't mind her helm at all, if her helm was to starboard. The moment the captain and the pilot saw that she wasn't doing this, they rang for stop and went full astern. The engines on the "Oceanic" answered with instant promptitude, and in less than two minutes she was going full speed astern; she had overcome her momentum, and the water from the propeller had reached a point forward of the bridge which this represents (indicating). The "City of Chester," however, slid right along here, and did slide right down on board the "Oceanic," striking just at about the point where I indicate by these points (showing). There was a scene of utter disorder and of

fright aboard the "Chester," and of discipline, manhood and courage on the "Oceanic." The crew of the "City of Chester," as many of them as could abandon the ship, abandoned the ship and went in over the bows of the "Oceanic" to save themselves. The boats of the "Oceanic," which I will show your Honor, were in perfect condition for handling. They were arranged with these patent falls, so that when the boat comes near the water, the tackle is let go, instead of being held by the bow and by the stern, so that sometimes the hook lets go on one end and don't let go at the other, and the boat is thrown down in the water and capsized; they were so arranged that they could be promptly lowered and got into the water. They are numbered on each side, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

Mr. White—Did they alternate?

Mr. Barnes—Yes; just like the berths in a sleeping-car. You and I understand that. The "Oceanic's" boats were lowered and manned, and all the lives of those who got into the water and went over the side of the "Chester," and not over the bows of the "Chester," on to the deck of the "Oceanic," were saved by the boats of the "Oceanic." The "City of Chester" did get out, or make an attempt to get out, one boat, but the discipline and the order of this steamship "Oceanic" saved the lives of all that were saved on that occasion. The rest of the people of the "Chester" saved themselves by going over the bows, through the gap, over on to the "Oceanic" while the ships were connected. The explanation of this collision is evident, and I think will be proven. Whether it is or not, it is contended on behalf of the defendant that it

conducted its business in the navigation of that ship in accordance with law; that it adopted every known precaution and exercised the best care to prevent this collision, all possible care to prevent this collision; that it tried in every way to prevent it and was unable to do so, although the ultimate reach and finish of human skill was applied before the disaster and after it occurred, but to no purpose. We shall undertake to show you what the matter was, and I think we shall establish our proposition. The "City of Chester" is a steamer between 1100 and 1200 tons burden. She was brought out here in 1875 or 1876; she was to go into the coastwise trade; she was a safe enough boat, but a perfect vixen at steering. She was hard to be handled and notoriously so, that the men on board of her who were competent to steer, I say, we will show your Honor that more than one left the ship because they would not take the risk of going into the wheelhouse to steer her.

We will show, I think, that that was known to everybody, from the Captain to the Steward's boy, on board of the Chester. She was extremely difficult to handle under the conditions that existed there at the time of this disaster. I have said to your Honor that this was a flood tide; the tide was coming in, running a six or seven knot tide. As your Honor will see from the confirmation of the coast, there must occur at this point tremendous set-offs or eddies from the San Francisco side when the tide is pouring in from the whole Pacific Ocean, and when, in this narrow place it strikes the land it causes the water to run in eddies, currents and rips that are not easy to handle or overcome. When the Chester came out there behind Fort Point she

caught the full force of that tide, and notwithstanding she put her helm, I presume, to starboard in an effort to send the ship to port, the force of the currents there seized her bow, and the steering purchase on the helm, not being where it could counteract the effects of this eddy, the helm went to starboard, and the rudder was so placed that it threw her off to the right, and the current caught her irresistibly and took her right down in that way, right straight across this place, and as the sea was coming in this way, she was seen to be coming at full speed—as the sailor phrase goes, I think, "with the bone in her teeth"—big, white foam dashing away from her bow, and she was borne right across over to the Oceanic.

Now we shall contend to your Honor that if that or anything like it occurred, that the "Oceanic" is not responsible for the difficulty of navigating the "Chester," nor for her obstinacy in refusing to mind her helm under the conditions that existed there. If that was known to anybody, it was not known to the officers of the "Oceanic." They were not presumed to know what was the trouble with the steering quality of this craft, and they had a right to presume that the distance was, at the time they saw her, ample for her to go right by without any danger; and that, so far as the passing of starboard side to starboard side, or, as they say, "Green to green lights," which is the same, they had a right to presume that this ship when she answered the signal, when she gave no danger signal, when she had not communicated or intimated to them in any way that she could not be handled nor steered, that they had a right to presume that the "City of Chester would do what she said she would do, and could

do what she said she would do. That she did not do, and the whole disaster, as we claim, is due to no mistake in navigation—no errors in handling, no omission, no want of precaution whatever on the part of those on the ship "Oceanic."

Now, there is another proposition to which I wish to call your Honor's attention. The result of this accident was most fortunate. If the "Oceanic" had not conducted itself in just the way she did and the "Chester" had come into the Oceanic, instead of having a few people to look out for, there would have been eleven hundred passengers on board that ship that would have been put in peril by the manner in which this vessel was handled and steered. I do not criticise Captain Wallace at all, for I understand him to be a good mariner, a good officer, as well as a gentleman in private life, but he had a craft that was practically unmanageable under those conditions that were found to exist there at the time. He had come out there from behind Fort Point, the forward part of his ship caught the full force of this incoming tide, and, instead of carrying the ship away, as his steering signal said he would do; instead of the ship minding her helm and obeying it and go in the direction in which the helm told her to go, she swung right across the place and came right down upon the bow of the "Oceanic," and it was about in that position (indicating) that the collision occurred, as I have said.

Now, then, where did this disaster occur? It was a curious circumstance, and, there being no jury here, I suppose there will be no objection to my mentioning it, that there was a great divergence of opinion as to the point at

which that collision occurred. Some of those who testified said that the "City of Chester" was close in here (indicating), near to Fort Point, and that the "Oceanic" came in on this side (showing) in such a way that the "City of Chester" could not get away from her, and that the "Oceanic" ran her down at this point, when she could go nearer to Fort Point than she already was, and they stuck to it with great pertinacity. The navigators who were on board the "Oceanic," and who knew as precisely the way up that harbor from where they were as your Honor knows the way from the bench to your Honor's chambers; knew when they passed the ten-fathom buoy, knew where they were when they were in plain sight of Bonita Point; knew where they were when they passed Point Diablo; knew where they were when the collision occurred, because they were just oft Lime Point, and they so testified that there was where the collision occurred, instead of down here (indicating), and there was where it occurred. Which of them say right? It is an interesting question and a somewhat important one.

We shall show your Honor that within a few hours, I do not know whether it was three, or four or five, but almost immediately after the accident, as soon as arrangements could be made, Captain Whitelaw, whom Your Honor knows, the wrecker and diver, had a communication with Goodall, Perkins & Company about the ship, and they said they did not think it was any use to try to do anything because she had sunk in sixty fathoms of water, and, of course, we all know that at sixty fathoms, diving operations, and the processes by which a sunken ship is eliminated from the locker of Mr. Jones cannot be availed

of. Still, Mr. Whitelaw went out with his tug and his men and found the ship. Now, the proof of the pudding is the eating, in my judgment. Here was a ship whose position was located by the most scientific methods (which will be explained to Your Honor), the character of the soundings, the methods by which the precise location and direction and position of the ship as she lay on the bottom of the bay, were ascertained, and were ascertained on the same day of the disaster during that very afternoon, and when Captain Whitelaw found her on that day she lay at a point indicated on this map by the concentration of these red lines here. Her bearings were taken by Captain Whitelaw, and she lay in a direct line with Point Bonita and Point Diablo. This line (indicating) extended from Point Bonita to Point Diablo and protracted struck the ship, and this course shows a line from the point where the ship lay to the needles and is indicated on here. And that was another course by which her position was determined. The third line was by taking the sight from Fort Point so that on the afternoon of the day of the disaster Captain Whitelaw located her at the concentration of these lines. This one from Point Bonita to Point Diablo, to tho point where she lay; this to the Needles and from there to Fort Point,

The question subsequently arose in the minds of counsel as to what had become of her when these people began to swear in this way as to her exact position. The question arose in the minds of counsel: "Well, what has become of her, anyhow?" and Captain Whitelaw was sent out again, with witnesses, for the purpose of determining where the ship was then. That was last November. They

went to the point where she was located before, and when the plummet went down, she lay precisely where she lay three hours after the accident, in precisely the same direction, precisely the same bearings and they went away, knowing with as much certainty the position where she lay as the certainty which I have in walking from here over to that clock and designating where it is.

It was said, and I have no doubt that there will be now, conflicting testimony upon this proposition. There will be persons who will say that that collision occurred right off Fort Point, and not where it did occur.

After these vessels struck, there was a small interval of time; it was precisely six minutes after the collision occurred between the vessels that the Chester was observed to be sinking, and by the order of the Captain, and upon the advise of the pilot, or by the command of the pilot and by the advice of the Captain, I do not remember which it was, but, at all events, intentionally the ships were kept fastened together as long as they could be for the purpose of saving life and giving everybody a chance to get off who could do so. At last, after about six minutes—I think it was just six minutes—it was found that the Chester was sinking, and the Oceanic pulled back, and when she was detached from her—the moment she was detached—the Chester went right down into the water and lay there, and is there now.

The points, then, to which I wish particularly to draw your Honor's attention, and that without knowing or understanding in any way what these libellants here claim, are that the Oceanic did not do what it ought not to do; that it owed duty which it did not perform to the Chester,

and without the slightest idea as to what they are going to claim, we make this opening of our case, desiring, as we think is proper, that your Honor ought to be informed somewhat of the circumstances of this case, and if I have taken too much time, I beg your Honor's pardon, but we wish to put your Honor, at the outset, into as full possession as we can of the conditions and circumstances connected with this collision, no matter which way the facts cut. We want your Honor to get the facts fully, fairly, without objection or cavilling, and we want to ask your Honor for a decision upon the broadest grounds, and I beg your Honor's pardon for taking up so much time.

Mr. White—I want to state that there is not going to be very much difference between General Barnes and myself in regard to these facts which have been set forth in the General's very elaborate statement. I do not think that there will be a great difference, but I wish to state here that very many witnesses that I am necessarily obliged to call are, from the position they occupied on that day, unfriendly to us; that is, I do not mean that they are going to be untruthful at all, but from the position that they occupied they are necessarily unfriendly to our side, and would attempt to explain away everything that occurred. The points upon which we rely would be very brief, except for the contention that the General makes as to some of the matters in regard to the position of the ships, and perhaps the steerage of the City of Chester. His statement of facts is substantially what we expect to prove. We shall make some modification of that by our testimony, and I hope that by calling—after listening to his statement—I hope that by calling only a few witnesses, that

we will be enabled, by what those witnesses say, and so much of the General's statement as is not in conflict with what the witnesses say, we will accept, and will be ready to rest our case.

(Recess until 2 o'clock P. M.)

AFTERNOON SESSION.

LOUIS MEYER. Called for plaintiffs. Sworn.

Mr. White—Q. What is your name?

A. Louis Meyer.

Q. What is your calling, Mr. Meyer.

A. I am Pilot of this port.

Q. A pilot in the San Francisco harbor?

A. Yes, sir; bar pilot and harbor pilot.

Q. Were you such pilot on the 22d of August, 1888?

A. Yes, sir.

Q. Do you know what is called the China steamship "Oceanic?"

A. Yes, sir.

Q. Did you board her and bring her in on the morning of August 22d, 1888?

A. Yes, sir.

Q. Go on and state to the Judge in your own way everything that there was about bringing in that ship up to the time of the collision with the "City of Chester," and the sinking of the "Chester."

A. I boarded the ship about 8 o'clock A. M.

The Court—Q. Eight o'clock in the morning?

A. Yes, sir; somewhere to the westward of the whistling

buoy, and steered towards the whistling buoy, and when the whistling buoy was abeam, bearing south southwest, in my opinion, about a mile to a mile and a half off, I changed the course for the heads, which is about northeast by east. After I had given the orders to go slow ahead, put the engines slow, and keep a very good lookout forward, and told the second officer who was there to sound the whistle and to give the sound not less than once a minute. In that way we proceeded.

Q. What was the state of the weather at that time?

A. The weather was foggy, but it was not constant, dense fog. Sometimes we could see as far as a mile and a half, and sometimes we could see more than a half a mile; never less than about a half a mile.

The Court—Q. What was the state of the tide?

A. The tide should be about slack water, but just making a flood. It was low water that morning at 6:15. In my opinion the tide should run out an hour and a half more. That would cross the bar at slack water, and would meet the young flood at the heads. While we were going on near the nine-fathom buoy we met a large vessel at anchor with a tow-boat at the head of her with a line out, ready to tow her in. I steered a little towards her, and asked the Captain of the tow-boat what kind of weather it was inside. He, I supposed, had come out that same morning. The answer was something I could not understand quite distinctly, but it sounded like "yes." He said something more than "yes." I made out it was "yes." We proceeded slowly on the same as we had done before, the vessel going from five to six knots, the whistle sounding every minute, or less than a minute. At that time we

heard the whistle of the North Head, Point Bonita, a little on our port bow, as we were going along, plainer and plainer. It seemed that we would pass it in about a very short distance. The whistle sounds when you get near to it higher. You can judge about how far you are off by the sounding of the whistle—the height of it. When we came abeam, which it was about 9:19, we saw the loom of the land through the fog.

Mr. Barnes—Q. Which land?

A. Bonita Point, at 9:19. I said then, and sent orders down below to go as slow as they possibly could; dead slow; just enough headway to keep steerage way on the vessel, and starboard half a point. With that course we made Point Diablo very plain.

The Court—Q. What was that order?

A. Starboard half a point on our course. Northeast half East. With that course we made Point Diablo very plain, not more than from a quarter to half a mile. Since coming in from Diablo we heard another steamer's whistle. I must say here, that previous to this, I had a conversation with the Captain; he wanted to know how the tides were, and if vessels were coming out. We had a long conversation about this. I told the Captain it would be flood tide and there were no craft coming out, no vessels, and but one steamer would come out this morning, which will leave the city at 9 o'clock; that is the only thing I know of coming out. When we neared Point Diablo I heard this whistle way inside. The weather was calm and the water just as smooth as glass. We could hear everything very plain. I heard this whistle on our starboard bow; I told the Captain, "That is, I believe, the steamer

coming out." "All right," says the Captain, "we will take care of her." After passing Point Diablo the steamer came nearer and nearer. We could hear his whistle, and of course we could hear our whistle. It was if he answered every blow to our blow. I said, "Now it is time to give him two distinct whistles to tell him we will starboard; he is now on our starboard bow; he is going this way, so that he may put his wheel starboard and clear us." He answered directly with two distinct whistles. At the time we saw the loom of him in the fog coming towards us; pointing towards our amidships, and the hull came out plainer and plainer. He seemed to be moving a little bit to starboard. It was only for a moment or two. She seemed to be under the influence of her port helm. I sang out, "Give him two more whistles." These two whistles were blown, and he answered them again, but instead of the ship answering the helm, as it seemed, I don't know whether there was something in the way, he came as under a port helm coming this way, right towards us. I said to Captain Metcalfe, "There will be a collision as sure as can be. I don't see how he can miss us; put your engines full speed astern." We were going then at the rate of not more than from 3 to 4 knots. We put the engines full speed astern. They could see that our vessel was stopped, and more, that she had sternway. I looked to see if she had stopped. I said, "We can see that she is going astern by the water of the propeller coming forward." He said, "Yes; but she is coming right for us; I think she will hit us on our starboard." Instead of that she came at a good rate; just cleared our stem, but struck with her port bow on our stem.

Mr. Barnes—Q. Take those two models and show how it was?

A. This being the "Oceanic," this was the "City of Chester." As she was coming we could see plainly the masts and funnel in a line like this (describing).

Mr. White—Q. Was that after the first whistle or the second?

A. After the first whistle.

Q. Immediately after the first whistle?

A. After the first whistle she hove in sight.

The Court—Q. The masts and funnel were in line?

A. After the first whistle, when she hove in sight, we did not see that she moved under her starboard helm as she ought to, and we gave another two blasts of the whistle, and he answered again two blasts of the whistle. Then he did not move to starboard as he ought to have done. As soon as I saw she moved this way, we went full speed astern, and she came just like this (illustrating).

The Court—Q. If you were going full speed astern, how is it that you did not keep away from her?

A. We were away from her altogether. We never pointed for her; we pointed that way (describing). He pointed for us. He ought to have kept away clear from us. We never pointed for him at all. When we struck, he must have headed about North to Northwest or North to Northeast. We never altered our course. At that time when she was this way, a moment before the collision, I could see Lime Point very nearly about that on our port bow; that showed that we did not alter our position or course at all. We laid right there that still. She had just commenced a little sternway when he came like that

(illustrating) with a good headway. I said to the Captain, "here she is coming right into us." She came just like this (describing).

Mr. White—Q. I understand you to say that when you reached somewhere near Point Bonita, that you were enabled to see that point?

A. We saw the loom of it through the fog; the black loom of it.

Q. The point loomed up through the fog?

A. The upper land.

Q. Point Bonita rises to quite a high hill there?

A. Yes, sir.

Q. You could see that looming up through the fog?

A. Yes, sir; the land is perpendicular up and down.

Q. About what direction were you from Poin Bonita at that time?

A. We were at the southeast of it. We steered northeast, and it was abeam.

Q. How far a distance were you from Bonita Point when you first saw it?

A. Not more than half a mile.

Q. Was it about at this point? Put your vessel where you were at the time you think you saw Point Bonita on the blackboard.

A. About there (illustrating).

The Court—Q. That is when you first saw Point Bonita?

A. Yes, sir, when it was abeam.

Mr. White—Q. Was it at that time that you changed your direction?

A. At that time I changed my direction half a point.

Q. A half a point further to the north?

A. Yes, sir.

The Court—Q. What course were you on at that point? What was your course?

A. Our course was northeast by east from the outside. At that point I changed to northeast half east.

Mr. White—Q. Northeast half north?

A. To northeast half east.

Q. For what length of time, or what distance, did you continue on this new course?

A. We saw Diablo; we came about this way; we saw that, I should say, about eight minutes later.

Q. How far off were you from Point Diablo?

A. About a quarter of a mile.

Q. Could you see Point Diablo from the point that you first located her?

A. No, sir.

Q. You think you were about a quarter of a mile below Point Diablo?

A. Yes, sir.

Q. How did you signal the outcoming steamer, the "City of Chester," before you reached this point opposite Point Diablo, or afterwards?

A. At Point Diablo we blew our common fog signals.

Q. Your fog signals of one minute each?

A. That is all.

Q. About what point were you when you first heard the fog signals of the "City of Chester?"

A. We heard them at Point Bonita already.

Q. About what direction did they bear from you, so

far as you were able to tell from the sound, at the time you first heard them?

A. They were well on our starboard bow.

Q. Still to the front of you?

A. No, sir; well on our starboard bow away to our right.

Q. How many points on your starboard bow do you think the sound was when you first heard it?

A. She must have been three points on our starboard bow.

The Court—Q. Could you locate her on those points on that diagram in general direction?

A. Yes, sir.

Mr. White—A point is 30 degrees?

The Court—No, 11 and a quarter.

A. I fancy she must have been here somewhere when we heard her first signal.

Mr. White—Q. When you were somewhere opposite Point Bonita?

A. Somewhere here (pointing).

Q. You think she was perhaps two and a half or three points off on your starboard bow?

A. Yes, sir.

Q. As she approached you, before you saw her at all, was there any apparent change in her direction, judging from the sound of her whistle?

A. Not very much.

Q. She appeared to be about three points off on the starboard?

A. That is what she was.

Q. When you first sounded the two whistles sig-

nifying that you were going to starboard, had you yet seen her?

A. No, sir.

Q. How long was it after you sounded the first two whistles before you saw the "City of Chester?"

A. That must have been about 3 or 5 minutes.

Q. From 3 to 5 minutes after you signalled her that you would starboard, and after you heard her signal that she would starboard?

A. About that.

Q. Where was she, so far as you are able to locate, at the time she first appeared to you out of the fog?

A. Two and a half to 3 points on our starboard bow.

Q. And about how far from you?

A. I should say about half a mile.

Q. Was that the place that you say you could see from where you were, that you could see that her two masts were in line with the pilot-house of the "Oceanic?"

A. Yes, sir.

Q. That indicated to you that she was coming directly to the point that the "Oceanic" then occupied, if she was in motion?

A. I could see that she comes right for the amidships of the "Oceanic."

Q. She was coming so that if the "Oceanic" had remained stationary and had she kept what was apparently her course, she would have struck the "Oceanic" amidships.

A. That may be; I think so; apparently.

Q. How long did she continue in that position before you sounded the second whistle?

A. About the time.

Q. About what length of time was there, as near as you are able to estimate, between the first whistle to starboard that you sounded, and the second whistle to starboard sounded by you?

A. A very few moments.

Q. How near to you was the "City of Chester" at the time that you sounded the second whistle?

A. About half a mile, as I could judge.

Q. I understand you to say she was about half a mile when you first saw her; is that right?

A. Yes, sir.

Q. I want to know how near she was at the time you sounded your second whistle?

A. When she hove in sight I sounded the secoond whistle.

Q. When she hove in sight?

A. Yes, sir; at that time.

Q. I understood you to say at first, that you saw her immediately after sounding the first whistle?

A. It was a few moments; immediately; a few moments.

Q. About how many minutes do you think, between the first and the second whistles?

A. It was hard to say; maybe 2 or 3 minutes.

Q. At that time the "Oceanic" was under what headway?

A. Dead slow.

Q. Dead slow would be how many knots an hour?

A. I should say from three to four knots, with the "Oceanic."

Q. In estimating that she was going dead slow, were you estimating the tide at all?

A. This was going through the water; nothing to do with the tide.

Q. There was a tide, was there not?

A. Yes, sir; that was the headway through the water to keep her steerage.

Q. Without considering how much the tide would carry her?

A. The tide would have nothing to do with that.

Q. You were riding in on the tide, were you not?

A. Yes, sir.

Q. Do you mean to have the Judge understand now that 3 or 4 miles per hour was her total advance, tide and all, or 3 or 4 miles without tide?

A. Without the tide.

The Court—Q. Through the water?

A. Through the water, to keep her steerage way.

Q. That was not the rate she was going, as compared to a point of land?

A. No, sir; this was through the water.

Mr. White—Q. Can you tell how fast she was coming in as compared with one of the points of land that you could see?

A. I have no idea of that. I don't know how the tide ran. I estimated there was very little tide at the time. It was so close in shore. The first of the tide makes in on the south shore; the last of the tide makes in mid-channel on the north shore.

The Court—Q. This was the young flood?

A. This was the young flood. It could not have run very strong.

Mr. White—Q. There was not very much time on her?

A. I don't think there was very much; may be 2 or 3 knots young flood.

Q. How long was it from the time you sounded the second whistle until you gave the order to reverse?

Mr. Barnes—He has already stated that at the same time he caught sight of her and saw how she was headed he gave the order to reverse.

The Court—He used the word "immediately," and then qualified that by saying "two or three moments." Do you want to find out what he means by that?

Mr. White—I want to find out exactly what my question indicates.

The Court—He has answered your question, that he immediately gave the order to stop.

Mr. White—Immediately, as used by a witness, is not a certain expression.

The Court—You can ask him further questions as to what he means by that.

Mr. White—Q. How long was it from the time you sounded the second whistle until you gave the order to reverse?

A. It was the same time; no time elapsed, when I gave the second whistle; about half a minute; I said "immediately."

Q. Did you give the signal to the engineer to reverse before you got the "City of Chester's" reply to your second signal?

A. After the second signal?

Q. Afterwards?

A. Yes, sir.

Q. What I want to know is, whether, after you got the second signal from the "City of Chester" saying that she would starboard, that you waited at all to see whether she would or not?

A. I could see the "City of Chester" at the time, but she was not moving as she ought to do.

Q. Why did you sound that second signal?

A. To make sure that he would starboard a little more.

Q. Then, when she did signal you that she would starboard, did you wait at all to see whether she would or not?

A. I could see that she did not; then reversed right away.

Q. Then, as I understand you, after you got the second signal from the "Chester" that she would starboard, you waited a little while to see whether she did starboard or not?

Mr. Barnes—He did not say so.

A. I did not wait a little while.

Mr. White—How long did you wait?

A. I immediately gave right away the signal to reverse, as she did not move according to her signal.

Q. Had you determined to reverse before you got the second signal from her?

A. No, sir.

Q. When she answered you that she was going to starboard, and the plan that you both had of passing was

acquiesced in by her, why did you immediately reverse?

A. Because after the first whistle I did not see her yet; between the first and second whistle she hove in sight. When she came in sight, and I saw she had not acted on the first two whistles to put the wheel hard astarboard, I blew two whistles again.

Q. What for?

A. To make it more sure, because I starboarded then myself; hard astarboard; I thought he would do the same, but he did nothing.

Q. Then the second signal was not sounded by you, to get her to starboard?

A. Certainly; that is what it was given for.

Q. She agreed to starboard?

A. When I gave the first or second whistle—when I gave a signal like that, that means to tell him I starboard and want him to do the same. He answered, "I have done the same;" that is his answer.

Q. If he did starboard at this time, and you reversed and carried you both back, was he not more likely to run into you than if you had kept your boat in advance.

A. No, sir.

Q. What I want to know, is, did you reply at all on that second signal that you got from the "Chester?"

A. Yes, sir.

Q. What did you do under that signal?

A. I put the wheel to hard astarboard.

Q. You had already starboarded?

A. And put the engines full speed astern.

Q. Did you keep the helm hard astarboard at the same time that you threw your boat full speed astern?

A. Yes, sir; I kept the wheel as it was.

Q. That had the effect of bringing the head of your boat around to port, did it not?

A. Not very much, when she has no headway on her.

Q. If your boat is going backwards, and you have your helm hard astarboard, which way does it throw the bow of your boat?

A. To the right, but not when she lays dead still, to any amount, and I saw that she was not throwing that way because I had Lime Point right on our bow the same as it was before. I saw she did not alter her position at all.

Q. At the time that you sounded the second signal to the "City of Chester" and got her reply, did it look to you as if there was any risk of a collision?

A. After she had sounded. I knew she could not clear us.

Q. You knew she could?

A. She could not; she could not clear us, because she was under, as it appeared, port helm instead of starboard.

Q. I want to ask you once more, why did you sound that second signal to the "City of Chester?"

A. Because his first signal was answered but not obeyed.

Q. After the first signal was answered but not obeyed, and you saw the "Chester" there was some such uncertainty in her movements that you did not know what she was going to do, is that so?

A. That is what it was.

Q. So that you sounded the second signal in order to verify the first one?

A. That is correct.

Q. When you verified the first one, you found she was going to starboard; is that right?

A. She was going to port.

Q. She had starboarded her helm. I am not as good a sailor as some people, and I do not know I make myself understood. She was going to your right?

A. She was going this way (describing).

Q. I know by the position of these two dummys.

A. She went ahead of us instead of this side.

Q. Then you felt certain after the second signal, that she had starboarded her helm, or promised you that she would, and she was trying to pass on your starboard side; is that right?

A. I don't know if she tried.

Q. So far as her signals?

A. So far as her signals she did.

Q. You believed at that time she was trying to pass on your starboard side, did you not?

A. At the time she blew the whistles I thought she would do so.

Q. At the time of the second whistle?

A. I thought she would do so.

Q. Did you, at any time, sound a signal of alarm to the "City of Chester;" several short blows of your whistle; five or six?

A. I did not think it was necessary.

Q. Why not?

A. Because she answered my first way signals, my two whistles.

Q. But you tell me that although she answered those, you saw that she was not going to port herself?

A. It appeared to me that she was moving a little that way, as I have stated before, but very little, and soon came the other way; that is why I blew the whistle again.

Q. Did you reverse full speed astern before turned she this way?

A. No, sir.

Q. That is, turn to the right?

A. No, sir; as soon as I saw she turned the wrong way, I reversed the engines.

Q. How long was it that she swung around in that way, after you received your second signal?

A. Right after sounding the whistle; right after the signal was given.

Q. You cannot estimate that time at all?

A. Right away.

Q. Within a quarter of a moment?

A. Something like that; right away.

Q. Half a moment?

A. Yes, sir.

Q. Almost immediately?

A. Almost immediately.

Q. When she did that, did you sound any further signals at all?

A. No other signals.

Q. But you gave the signal to your own boat then to go full speed astern?

A. That was it.

Q. Did you sound any kind of signal to indicate to

the "City of Chester" that you had signalled your boat to go full speed astern?

A. I could not do that.

Q. The second signal of two blasts was the last signal that you gave the "City of Chester"?

A. Yes, sir.

Q. At the time you speak of, you say when she hove in sight she was about two and a half or three points on your starboard bow, and about a half a mile distant?

A. Yes, sir.

Q. At that time could you see this south shore?

A. Not at that time; I did not look. I had not time to look. I might have seen it.

Q. You might, perhaps, have seen it?

A. I did not look.

Q. You have so much to do, you did not look?

A. I did not look.

Q. You had, however, before that time, seen some two or three points on the north shore?

A. Yes, sir; I may say this. I remember now that the Captain said, he stood on the starboard side and he said, "I see the loom of the Fort." That I remember he told me.

Q. He told you he saw the loom of the Fort?

A. Yes, sir.

Q. That is, the Captain mentioned that to you before you signaled to the "Chester" that he saw the loom of Fort Point, or the Fort?

A. Yes, sir; abaft our beam. I don't know exactly what he said—abaft the beam. I did not look. I had no time to look.

Q. That was before you signaled to the "Chester" at all, was it?

A. That was a few moments before the collision occurred.

Q. Was it a moment before the collision that you and the Captain were talking?

A. It was between the second blast of the whistle and the collision.

Q. Between the second blast of the whistle and the collision?

A. Yes, sir.

Q. The Captain was telling you he saw the loom of Fort Point?

A. Yes, sir.

Q. If you had brought your ship in along the south shore, and the "Chester" had gone out along the north shore, would there have been any collision?

A. I cannot tell that.

Q. You cannot tell that?

A. I could not tell that.

Q. How much sea room is there at the narrowest point in the channel there?

A. Seven-eighths of a mile.

Q. Is seven-eighths of a mile of water deep enough for a ship like the "Oceanic?"

A. Between the buoy at the Fort and Lime Point there is any amount of water.

Q. You do not know the dimensions of the "Oceanic," do you?

A. Yes, sir.

Q. What are her dimensions?

A. I could not tell you very exactly, but she is 2800 tons registered tonnage.

Mr. Barnes—Thirty-eight hundred?

A. She is very nearly 3000 tons, I think; I forget exactly.

Mr. White—Q. How long is she?

A. I could not tell you exactly; I should say 380 feet long.

Q. How wide?

A. She may be 45 feet wide, or near that.

Q. Do you know whether or not in this collision the "Oceanic" was damaged?

A. She was damaged a little.

Q. What damage was done to the "Oceanic?"

A. That I cannot tell you exactly; it was on the plates near the stern.

Q. At the time of the collision and until the "Chester" went down, I suppose you remained in the pilot house of the "Oceanic?"

A. No, sir.

Q. What did you do?

Mr. Barnes—He was not in the pilot house at all.

A. I was on the bridge.

Mr. White—Q. Did you remain on the bridge of the "Oceanic"?

A. The captain says, as soon as it looked like a collision, "You go forward quick and see what is going on there, and keep the vessels together as close as you can, and let me know what you want to do."

Q. You went forward, did you?

A. I went forward.

Q. From that time on you did not go back to the bridge until after the "City of Chester" went down?

A. Not until after she went down.

Q. You went forward right at the bow of the "Oceanic" as soon as you could get there after the collision?

A. Yes, sir.

Q. About how far back from the "Chester's" bow did she strike?

A. She struck about abreast of the foremast; about on the port bow.

Q. How far back was that foremast from the bow at the extreme point?

A. I could not say exactly; it seemed to me about 25 to 30 feet.

Q. How for, so far as you were able to judge, did the bow of the "Oceanic" go into the side of the "Chester"? how far did she cut into her?

A. She went a good way into her.

Q. How many feet?

A. I could not say exactly how many feet; several feet.

The Court—Q. You stated in the first part of your examination that the young flood was making up on the south shore.

A. Yes, sir.

Q. Does the young flood make up on the south shore first?

A. Yes, sir.

Q. State its direction, taking that point there, showing the direction of the young flood.

A. The young flood makes in here first, and strikes

this shore, and makes up that way and goes around that way (illustrating on the diagram on the blackboard). It is young flood here and sometimes ebb tide there, or slack water, and nothing at all on the north shore.

Q. You were not in the young flood then that morning?

A. No, sir; I wanted to be where there was no flood, if possible.

Q. You must have been following in on slack water?

A. That is what I judged about.

CROSS-EXAMINATION.

Mr. Barnes—Q. How long have you been a master mariner?

A. About 25 years.

Q. How long have you been a harbor and bar pilot?

A. Nine years now, and four years when the accident occurred.

Q. Had you taken in and out of the harbor other vessels of the class of the "Oceanic?"

A. Yes, sir.

Q. You say that when you came in that morning, you passed this four-masted British ship at anchor, fastened to a tug and making preparations to come in after you?

A. Yes, sir.

Q. Do you know whether that four-masted British ship and the tug came in after you or not?

A. Yes, sir.

Q. Came right in along after you?

A. Came right in while we were in the wreckage.

Q. If the "City of Chester" had obeyed the signal

that you gave to starboard the helm, that would have sent both ships to port and made you pass with the starboard side of each towards each other?

A. Yes, sir.

Q. If, when you gave the first signal, she had gone to starboard and answered your signal, was there any danger of collision?

A. Never.

Q. If, when you gave the second two blasts, meaning "We are going to the left, go you to the left," and he answered he had gone to the left, if he had minded his helm, then was there any danger?

A. I think there was no danger.

Q. Just as soon as you say that there was danger because she was not minding her helm, I understand you say you gave the order to your ship to go full speed astern?

A. Yes, sir.

Q. Was that order obeyed?

A. Right away.

Q. At the time of the collision, did the "Oceanic" have any headway on her, or was she going astern?

A. She had very little headway, if any; at the time of the collision, she had a little sternway on her.

Q. You were asked by Mr. White, if you did not give any danger signal. What is a danger signal?

A. A danger signal is a long blast of the whistle; an exceedingly long blast or several small toots.

Q. What is the object of the danger signal? When is it used? What is it for?

A. If given signals are not understood or acted against.

Q. In this case the given signals were understood and answered?

A. Yes, sir.

Q. Did you get any signal from the "Chester" that she could not answer her helm, or could not be handled where she was?

A. No, sir.

Q. What time, if any, was there from the moment you saw her and that she was not doing as she said she would do, and the time when you ordered the ship to go astern?

A. Several minutes.

Q. You do not understand me. Between the time that you saw that she did not answer the second signal by the action of the ship, how soon was it that you gave the order to send the "Oceanic" astern?

A. Right away.

Q. Do you now know of anything that you could have done as a pilot, in handling the "Oceanic," which could have prevented that collision?

A. There was nothing left undone that we thought could be done.

Q. Do you know of anything now that you omitted to do?

A. No, sir.

Q. That could have been done; that would have saved the collision?

A. I do not know of anything.

Q. Do you know of any rule or regulation regarding the conduct of steamships in a fog, either as to speed or as to signals, which was omitted by the "Oceanic?"

A. No sir; there was nothing.

Q. Was there any period of time from the time when you got opposite Point Bonita until the time of the collision, that this steamer "Oceanic" was going fast?

A. No, sir; she was going just dead slow.

Q. All the time?

A. All the time since passing Point Bonita.

Q. Was there any moment of time that the fog whistles were not sounded?

A. No, sir.

Q. I show you now this photograph of the "Oceanic." Show the Court where the bridge is?

A. This is the bridge.

Q. Where did you stand?

A. I stood amidships.

Q. Where was the Captain?

A. The Captain was a little to my right.

Q. Who else was on the bridge?

A. The second officer was near me, a little on my left side with the string of the whistle in his hand.

Q. Where did the string that connected with the whistle go? Where was the whistle?

A. This is the whistle in front of the funnel. The string goes right over a pulley for him to pull.

Q. Was he on deck or on the bridge, pulling that fog whistle from the time you gave the order after you took command at 8 o'clock until the collision occurred?

A. He was there always.

Q. Do you know where the first officer was?

A. He was with his watch in the eye forward, with the carpenter.

Q. Where was the third officer?

A. The third officer was left with his watch.

Q. What were they there for?

A. They were there to attend to their duties.

Q. What were their duties there coming into port?

A. To look out. The fourth officer was there.

Q. What was the fourth officer stationed in front of the pilot-house for?

A. He has to watch that the command is obeyed; the command from the pilot.

Q. Show the Court where the steering apparatus is; where the men are that steer?

A. Right in this place here.

Q. Under the bridge?

A. Under the bridge.

Q. What communication is there between the bridge and the steering room or pilot-house?

A. There is a large hatchway where we can see the men and talk to them.

Q. How were the orders on that ship communicated from the bridge to the engine-room?

A. By telegraph.

Q. Did they have the best apparatus of telegraph on board the "Oceanic?"

A. Yes, sir; the latest improvements.

Q. Were there only one or two telegraphs on the bridge?

A. Two, one on each side.

Mr. White—I object. This is not cross-examination.

The Court—It is not cross-examination, General.

Mr. Barnes—If there is any objection to it, all right.

Mr. White—I do not intend to question that matter at

all; therefore it is not necessary to go into it. I make no contention but what that steering apparatus of the "Oceanic" was all right.

The Court—Q. At the time of the collision was the "Oceanic" in sternway or going ahead?

A. The backwater from the propeller came amidship, so I thought she must have had a little sternway, or we could not have had water from the propeller coming towards amidships.

Q. What power of propulsion brought the two vessels together?

A. The sliding of the "Chester" toward us.

Q. It was the "Chester" that impinged on the "Oceanic"?

A. Certainly; we never pointed for the "Chester"; we pointed for open space. The "Chester" pointed for us and came towards us as if under a heavy port helm, in a kind of sliding way.

Q. Then the power af collision was on board the "Chester" and not the "Oceanic?"

A. That is what I believe; to my best knowledge.

Q. After the collision did you do anything on board the "Oceanic" to prevent the two vessels from pulling apart? You remained together for some time?

A. We remained together.

Q. How long?

A. Until the "Chester" went down. Just before she went down, I was away forward. The foreyard came down and nearly struck me, so close we were together then. Some one said, "Clear out." I had a rope over the bow, and had some passengers of the "Chester" on

this rope, and the second officer was there with his boat to take them from this rope. He had already one in his life-boat when this foreyard came down, and, unfortunately, I let go of the rope. I could have been killed if I had not let go. I did not let go altogether. I slid it through my hand and tried to take a turn on the forestay. The yard came down and struck forward just sharp on the "Oceanic's" head, and went down and took the boat and people and everything down.

Q. Did the bow of the "Oceanic" cut so far into the "Chester" as to bring down the foremast?

A. No, sir; this was when she was foundering. It looked to me but a very small cut; in fact, it was done naturally, sliding; it was not such a very heavy cut, because she floated forward, I should judge, over six minutes, sure.

Q. As I understand, there was no power of propulsion on board the "Oceanic" to set the "Oceanic" into the "Chester"?

A. Nothing at all.

Q. The force was on board the "Chester" coming down on the bow of the "Oceanic"?

A It was a wide hole; not a sharp hole.

Q. That is not what I am talking about. What was the power that brought the two vessels together?

A. The sliding of the "Chester."

Q. And you had some stern way on board of the "Oceanic"? You were not on the bridge. You do not know if that was maintained or not?

A. The Captain told me to go forward. As soon as the collision occurred the engines were stopped and she

remained stationary. The Captain says "You jump forward quick and see if you can keep the stem of the "Oceanic" into the hole made in the "Chester."

Mr. Barnes—Q. What was the object of holding them that way?

A. To keep her afloat as long as possible.

Q. Will you show me on the diagram as nearly as you can about where the collision occurred?

A. It occurred somewhere here (pointing).

The Court—Q. Was there any drift at that time, or seaway?

A. No, sir, I do not think there was; the water was perfectly smooth.

Q. Did the vessel go down in the same spot where the collision occurred, or was there a drift one way or the other?

A. We drifted with the tide inwards.

Q. The vessel went down not at the place of collision?

A. No, sir.

Q. Is that the spot where the collision occurred (pointing)?

A. Yes, sir.

Q. Where did the "Chester" go down? Just point it out?

A. She must have laid about there (pointing).

Q. Then you think that after the collision, and up to the time she went down there was a drift inwards?

A. Yes, sir,

Q. On the tide?

A. Yes, sir.

RE-DIRECT EXAMINATION.

Mr. White—Q. The only object of keeping the stem of the "Oceanic" in the hole in the "Chester" was to keep the "Chester" afloat?

A. Yes, sir.

Q. Then the break in the "Chester" was so bad, that it was feared from the "Oceanic" that she would go down immediately if the vessels separated? Is that right?

A. That I do not know.

Q. You only know that you heard the Captain say to keep the vessels together?

A. Yes, sir.

Q. Do you mean to tell us that there was but one thing that would have saved the ship from colliding with you, after you first saw her, and that was that she should go to starboard; that she should obey her starboard helm?

A. Certainly.

Q. That was the only thing that would prevent a collision, from the time you first saw her?

A. Yes, sir.

Q. Then, from the time you first caught sight of the "Chester" you felt that there would be a collision unless she went to port?

A. Yes, sir.

Q. Unless she obeyed her starbord helm?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. If that is the condition of affairs, why did you sound the second signal?

A. Because she did not go that way.

Q. You sounded the second signal to get her to go that way?

A. Yes, sir.

Q. Then did you wait at all, to see if she did go that way?

Mr. Barnes—I do not like to interrupt, but counsel have already been over that ground with the witness two or three times.

Mr. White—It is the same question, but it is a very peculiar condition of affairs.

The Court—I will allow you to ask the question.

A. I saw she did not go that way. I saw she did not.

Mr. White—Q. When you saw she did not go that way after the second signal, you ordered your boat full speed astern, is that right?

A. Yes, sir.

Q. Let me see if I cannot refresh your recollection a little. Do you remember testifying before the Board of Local Inspectors of Steam Vessels, sometime, I think, about October, 1888, when they had an inquiry in reference to this, before Messrs. Talbot and Hinman?

A. Yes, sir.

Q. Do you recollect that?

A. Yes, sir.

Q. Your recollection of what occurred then was probably better than it is now?

A. It is the same.

Q. The same?

A. I fancy so; may be not.

Q. Do you remember at that time this being your un-

derstanding of it: "We saw the bow of the steamer to our starboard, the same direction as we had heard the whistle, and apparently by the white center in her bow, she appeared to be going at a high rate of speed. At that time we were able to see from one-quarter to one-half a mile. The steamer, as I observed, was going for about our bow, and Captain Metcalf said, 'What is he doing?' and I said, 'He has answered our whistle, and if he has complied with our signals everything will come out all right.' When we saw she was coming direct for us, I ordered the engines full speed astern." Was that right?

A. It was after the second two whistles.

Q. After you had watched her long enough to see she was not obeying the signal, then you went full speed astern; is that right?

A. That is right; that is what I said a little while ago.

Q. About how long would it be, from the time that she answered your signal, before, if she obeyed the signal, her course would show it to you?

A. I do not understand your question.

Q. How long would it be from the time that she gave a signal, and if at the same time she put her helm hard a starboard, before the course of the vessel would show she had obeyed it?

The Court—That would depend on whether she obeyed it or not.

A. I cannot tell that.

Mr. White—I am assuming the condition of the ship now that did obey and respond to the helm?

A. The ship never responded to the helm, by the looks of it.

The Court—Q. The question Mr. White propounds is this: How long after an order had been given and she obeyed it, would that have been apparent to you on board the "Oceanic?"

A. Certainly.

Q. How long after the order had been given, would you have noticed it on board the "Oceanic?"

A. Right away.

Q. If she had obeyed the order?

A. I would have seen it right away.

Q. Suppose after the second time you sounded the whistle and she had replied, and in accordance with her reply that her helm was hard a starboard, how soon would you have noticed that if the vessel was obeying her helm?

A. Right away.

Mr. White—Q. Does it not take some time after one of these vessels throws her helm from one side to the other before the vessel responds?

A. Not if she has so much headway as she had.

Q. You do not know what headway she had.

A. We saw the white volume of water under her bow, and the captain said to me, "She comes like a dog with a bone in her mouth," at full speed. If she comes at that rate of speed she should answer immediately.

Q. She was running against the tide?

A. That made no difference to her headway through the water.

Q. It would make a difference in her appearance of having a bone in her mouth.

A. That is her headway through the water; that has nothing to do with the tide.

Q. The actual progress she would make, as viewed from the land here at Fort Point, might not be very great, though she appeared to have the bone in her mouth?

A. Yes, sir; she had great headway on.

Q. As I understand, you say, when you saw the "City of Chester" a half a mile away and some three points on her starboard bow, that nothing could avert the collision or disaster except her turning to starboard?

A. That is what it is.

Q. I will ask you another question. You have been for nine years a pilot, taking vessels in and out of the harbor?

A. Yes, sir.

Q. This disaster occurred over five years ago, so you had been a pilot some four years before that?

A. Yes, sir.

Q. Had you been familiar with this harbor before you became a pilot?

A. I ran a coasting steamer four years before that.

Q. How often did that bring you in and out?

A. Two or three times a month; twice a month.

Q. That is twice in and twice out.

A. Yes, sir.

Q. You know how the tides run, then, do you?

A. Yes, sir.

Q. In coming in here and seeing the "Chester" off this point, did you know she was in the tide?

A. I could not tell that.

Q. Why not?

A. Because I could not see her.

Q. When you did see her, did you know she was in the tide?

A. No, sir; she was in the tide as I was; she was in the flood.

Q. You knew she was in the flood tide?

A. Yes, sir.

Q. You knew that she was nearer to Fort Point, this south shore, than you were?

A. I don't know that.

Q. You did know it. You knew she was 3 points on your starboard bow.

A. She was near to Fort Point; how near, I don't know. I don't know how far she was from Fort Point. She must have been a half a mile.

Q. You knew she was nearer the south shore than you were, did you not?

A. Yes, sir.

Q. And you knew that at that kind of tide, the tide ran up strongly along the south shore here, across the channel between Lime Point and Fort Point, did you not?

A. It runs towards mid-channel, and then straight in.

Q. You were north of mid-channel?

A. Yes, sir.

Q. Your theory is not that the "Chester" was caught in the tide at all?

A. That, I cannot tell.

Q. Where the disaster occurred, and for a great deal of water on your starboard from the disaster, was water that was not affected by this turn in the tide from the south shore?

A. I was, perhaps, out of that set.

Q. The disaster occurred considerably north of the mid-channel?

A. Yes, sir.

Q. In the mid-channel, as I understand you, this tide does not set across the channel between Lime Point and Fort Point, but the tide sets straight in at that time, flood tide?

A. The tide sets across; sometimes more, sometimes less. She must have been in the tide or just coming out of it; she had been in the tide in that set before she reached me. It may be that the tide run in altogether at that time. It may have been here that the tide run in here and there at the same time. The "Chester" struck the heavy like this that sets round like this, and runs out here (illlustrating).

Q. You were north of the mid-channel?

A. I did not put that exactly right. I ought to have made this line a little more this way.

Court—Q. Take the chalk and make that line?

A. It sets about there, so far as that; that would be the right way.

Q. That is the set of the tide?

A. That is the set of the tide at the flood.

Q. The question you answered when you put the other mark on was the set of the young flood?

A. Yes, sir.

Mr. White—Q. That is what you mean, that this is the young flood?

A. This is the full set of the tide at the full flood.

Q. You think on account of the water striking against the land here, and being deflected to the left, it is carried out pretty well towards mid-channel?

A. That is what it is.

Q. As near as you understand the position of the "Oceanic" you were north of mid-channel ?

A. Yes, sir.

Q. This is the position that you put the "Oceanic" in at the time of the collision ?

A. Yes, sir.

Q. About how far would that place be, where the collision occurred, from mid-channel ?

A. It must have been very near.

Q. Very near mid-channel.

A. She must have been very near mid-channel.

Q. Then you were coming in very near mid-channel ?

A. No, sir; the "Chester." I was on the north side.

Q. We will agree on this: That the "Oceanic" was here when the collision occurred (pointing)?

A. Yes, sir.

Q. Now, I want to know how far this point of collision is from mid-channel?

A. Pretty close.

A. Then, as I understand you, you do not want to say now, you were hugging the north shore?

A. Yes, sir; I was hugging the north shore; that is only a half a mile; only seven-eighths of a mile. From here to there is only a few hundred yards (pointing.)

Q. How far is it from there to the north shore?

A. We were a quarter of a mile from the north shore.

Q. How much deep water did you have on your port side?

A. You can go right on to the beach. It is very near deep water right to the beach.

Q. Then there was sea room so that you could have

gone nearly a quarter of a mile further north if you wished to?

A. If I wished to.

Q. When you first gave the signal and got your reply, the two blasts, how much did you turn the helm of the "Oceanic" to starboard?

A. At the second two blasts?

Q. No; the first?

A. At the first?

Q. Yes?

A. We put the wheel hard over.

Q. Hard to starboard?

A. Hard to starboard?

Q. The first thing?

A. Yes, sir.

Q. Never turned it after that?

A. No, sir.

Q. Do you place that as the point where you sounded the first signal?

Mr. Barnes—No.

The Court—That is where he saw Point Bonita.

Mr. White—Q. Can you locate on your line, about where the "Oanceic" was when the first signal was given by you to the "Chester?"

A. Just when we passed "Diablo"; after we had passed Point Diablo.

Q. About here (pointing)?

A. Yes, sir.

Q. Is that about right (marking)?

A. I think so, as far as I can remember.

Q. About how far was that from the point of collision; half a mile?

A. I don't think it is half a mile; it may be.

Q. How many times have you taken the "Oceanic" in and out?

A. Several times.

Q. Do you know upon what radius she can make a complete circuit, so as to face the other way, in still water?

A. I have never tried it.

Q. Don't you know she can turn clear round in half a mile?

A. I could not tell you.

Q. In clear, still water?

A. I never tried.

Q. You don't know anything about that?

A. No, sir.

Q. You are certain about that, that you put the helm hard a starboard and kept it there from the first signal?

A. Yes, sir.

Q. You did not change it at all, in fact?

A. No, sir.

Q. After you reversed full speed astern, you did not change it?

A. No, sir.

JOHN METCALF. Called for plaintiffs. Sworn.

Mr. White—Q. Your name is John Metcalf?

A. Yes, sir; that is my name.

Q. What was your calling in August, 1888?

A. Master Mariner.

Q. What vessel were you in command of?

A. The "Oceanic."

Q. You remenber, of course, the bringing in of the "Oceanic" on August 22d, 1888, at the time of the collision with the "Chester?"

A. I remember perfectly.

Q. Go on and explain, in a narrative way, all that occurred from the time that you first located your vessel outside the whistling buoy up to the time that the "Chester" went down. I may ask you some questions after that for more particulars.

A. Early in the morning of August 22d, we were approaching Point Reyes; the weather became misty and foggy, gradually lifting; sometimes setting down, getting thicker and lighting up again. We ran in the given distance from the observations of the previous noon, stopped, sounded, and found ground somewhere about 25 miles from Point Reyes. Having found ground and ran the ship in at varying speed, according to the weather sounding at every few miles to verify the ship's position, eventually approached Point Reyes; stopped sounding because it was within the sounding signal distance, and picked up the whistle at Point Reyes; kept along the course we were steering, passed Point Reyes at an estimated distance of—I scarcely remember the distance now—but about three miles. I think that was the position I assumed the ship to be in, from the course steered, knowing that the course I had steered from the previous noon should put her about that far off the Point. I then proceeded on at varied speed until we were approaching the pilot grounds, as we got near the whistling buoy; stopped the ship and picked up the gun, a signal on board this particular pilot boat, and found it was outside of us, steamed slowly, picked up

the boat, got the pilot, and he took charge. He steered the ship in for the whistling buoy, which we picked up and passed it on the north side, probably about a half a mile off. We then shaped the course according to the pilot's direction for the north head and went along at varying speed, sometimes half, sometimes slow and occasionally stopped. When about half way between the whistling buoy and Point Bonita, we saw on our port bow a large sailing ship with a tugboat ahead. I suppose she was fully a half a mile from us. As we got near the ship, both the pilot and myself hailed the vessel, more particularly the tugboat, asking what kind of weather there was inside; but we were such a distance off, although we had stopped the ship to make things as quiet as possible, that we could not hear the reply. We could just hear a loud sound, but could not say whether it was yes or no or what it was. We then proceeded on slowly, steering for the north head, which is Point Bonita, and I told the pilot I wished him to keep to the north shore simply because that is the safest shore, where the government had placed all the fog signals on that shore, being free from danger, as a guide to the navigation of the port; the pilot said he would do so. We passed Bonita Point about half a mile off. We could just see the black loom of the land on our port side. The ship was then put at dead slow by the engines, and soon after, I don't know exactly how long, we passed Point Diablo. That we could see pretty well. We could seo right from the water line up a considerable distance. I could not see the top of land. That place, I judge, we passed about a quarter of a mile. Soon after passing Point Bonita, in order to hug the north shore more surely, the

pilot altered the course about a point to the northward. When about in the neighborhood of Point Bonita, or somewhere between that and Point Diablo, we heard the first whistle of an outcoming steamer. Previous to this, I had had some conversation with the pilot as to the likelihood of meeting anything coming out I said that I was glad it was flood tide that we were going in on, because we would have no schooners or any other small craft beating out on an ebb tide, which is the time they usually leave port, and the weather was sufficiently clear to let us take care of anything coming out in the shape of a steamer. Somewhere in the neighborhood of Point Diablo, or between that and a little further out, we heard, as I said before, the sound of a steamer's whistle, the fog signal going. Ours had been going continuously from the time we were making the land off Point Reyes, some hours before we came there, on account of the mist, going continuously at an interval of a half a minute. After passing Point Diablo some little distance, looking carefully on the starboard bow, which was the place we heard the signal of the outcoming steamer, I saw the dark mass of a hull looming up through the fog about two and a half points on the starboard bow; two and a half to three points. I said to the pilot at that time, "There is that craft." He said, "Blow two blasts." The second officer at the whistle blew two whistles, and our helm was put hard a-starboard at the same time. The ship, not having much way on her, turned gradually and slowly to port. Soon after that, watching this ship carefully, he answered these two signals we gave him. We gave him two.

Q. Two blasts or two signals?

A. Two blasts of the whistle, meaning "Pass me on the starboard side," to which we received an answer. If the ship had acted on that starboard helm, there is no reason why she should have passed any nearer than a quarter of a mile of us. Watching him carefully, we saw there was little or no indication of him acting on the starboard helm, and the whistle was repeated and was answered again. Immediately after seeing that there was no indication of the ship acting on the starboard helm, I said to the pilot, "What the devil is that fellow doing?" I had my hand on the telegraph at the time. I rang the telegraph, "Full speed astern" as hard as I could. At the same moment I sung out, "Full speed astern," and then I was watching the two ships carefully, because when we went full speed astern, before we struck the "City of Chester," I looked over the end of the bridge and I could see the back-wash from the propeller of the 'Oceanic" coming up between the funnel and the bridge. It was perfectly certain that the "Oceanic" had little or no way on her at the moment we touched the "City of Chester." You cannot get the back-wash of the propeller up there if the ship has any way on her.

Q. No way through the water?

A. The "Oceanic" had little or no way through the water. At the moment the two ships came together, the "Chester" had considerable way on her. We saw no indication of her answering her starboard helm or obeying the signals mutually agreed on between us. About the time of the second signal, or very soon after, we could see the ship swinging rapidly as if under a strong port helm, and the "Chester" having considerable way on her, came

across the "Oceanic's" bow; for some little time it looked as if the "Chester" might run into the "Oceanic." I simply waited developments in order to give the necessary orders if she struck the "Oceanic" or got across our bows. She practically impaled herself on the "Oceanic's" stem. At the moment of collision, I told the pilot, Captain Meyer, "You run forward Captain Meyer, and help save life, and give me any order to keep the two ships together in case the ship is going to sink. I also gave orders to put the boats out, take forward life belts and life buoys, and see that the available men were at the stem of the ship, in order to save all possible life. The boats were got out, and were alongside of the bridge, two or three moments before the "Chester" went down. Five boats altogether I think were alongside of her. I hailed the third officer and one of the others, and told them to be careful when they took the boats to the "Chester" that they were not drawn down by the vortex usually made by a sinking ship. Directly we struck that ship; a great number of men, who I should judge to be the crew of the "City of Chester," came piling up over the bow of the "Oceanic," followed shortly afterwards by a number of others, some women and mostly men. The boats in the meantime had rescued a great number of people, one boat having in her about thirty-two. These were all got on board of the ship as soon as possible.

Mr. Barnes—Q. That is your boats, not the Chester's?

A. The "Oceanic's" boats; there was only one boat that I saw get away from the "Chester;" the only man that I saw on the "Chester" trying to get a boat out was the Captain, and I think one other officer, and probably

one or two passengers. There were three or four men altogether. About six minutes after we struck the ship, the "City of Chester" went down.

Q. About six minutes ?

A. About five or six minutes. When the ship went down, the pilot came aft on the bridge and said, "Captain, we will have to go ahead a little, or else you will be on Arch Rock." I said all right.

Mr. White—Q. That is after the "Chester" went down?

A. Yes, sir. We had gradually drifted in with the flood, and we had to go ahead a little, and the engines were stopped, and never moved again until we let go the anchor.

The Court—Q. How long did you keep your helm hard astarboard after you gave your first signal ?

A. I think the helm would be hard astarboard probably not more than 2 minutes.

Q. When did you change the helm ?

A. It was not changed until we were probably going clear of Arch Rock.

Q. Not until after the collision ?

A. Certainly.

Q. If your helm was hard astarboard and you had given the order of full speed astern, that would throw your bow to the right, would it not ?

A. Yes, sir; the helm having been starboarded the ship altered her course probably a point or a point and a half to the north; the propeller going astern checked the action of the rudder and brought her back much to the same position.

Q. That brought her closer to the "Chester" than she was before?

A. Yes, sir; but the way was stopped at that time; there was no way on the "Oceanic;" there could not be with the back wash.

Q. A vessel going astern with the helm hard astarboard, would swing to starboard and not to port?

A. Yes, sir; it would swing to starboard.

Mr. Barnes—Q. It depends on whether it has a right-handed or left-handed propeller?

A. It depends on whether it is a right-handed or a left-handed propeller. The "Oceanic" is a right-handed propeller. Therefore, it acted against her starboard helm, and brought her back to about the original way of her head, when we gave the order to go astern, because, if my memory serves me correctly, the ship's head was somewhere about northeast at the time we struck, and the two ships together.

Mr. White—Q. When was the order changed from full speed astern to something else?

A. Do you mean, when we put the engines full speed astern to prevent the collision?

Q. Yes; what was the next order given?

A. To stop, at the moment of the impact of the two vessels.

Q. Was the order to stop before or after the collision?

A. At the moment.

Q. At the moment of the collision?

A. I put my hand on the telegraph. I did it myself.

Q. You put that at stop?

A. Yes, sir.

Q. What was the next order given for the steering of your ship?

A. No order whatever; the ship having no way on her, any order to steer would be useless.

Q. At the moment of the collision, and after that, until the "Chester" went down, the "Oceanic" had no way on her at all, but the two vessels were floating?

A. About the moment that the "Chester" was sinking, the "Oceanic's" engines were given two or three turns astern, in order that the "Chester's" masts and yards might not come down and kill the men on the head of the forecastle They were given only two or three revolutions astern, which cleared the two ships.

Q. From the time they collided up to the time that you saw the "Chester" was going to the bottom and that you must free the "Oceanic" from her, neither boat was under way at all?

A. The "Oceanic" was not. I do not know about the other boat.

Q. If the "Chester" was under way, she was carrying the "Oceanic" with her further off to the North, was she?

A. My own impression is that at the time of the collision the "City of Chester" was going astern.

Q. That you do not know for certain?

A. I could almost swear that the "City of Chester's" engines were going astern.

Q. You mean that the engines were reversed?

A. Yes, sir.

Q. You do not mean that the "Chester" actually had a motion?

A. Sternway?

Q. Sternway?

A. I know she could not have had, or else she could not have got cross the "Oceanic's" bow.

Q. Now, how far into the "Chester" did the bow of the "Oceanic" go?

A. I cannot tell. I was on the bridge.

Q. Do you know what kind of wound was made on the "Chester"?

A. I have no knowledge whatever.

Q. In about what direction did the "Chester" head at the time that she was struck?

A. I think—I could scarcely say—somewhere nearly straight across our bow; as nearly as I remember now.

Q. As nearly as you can remember, the situation of the two vessels was practically the same as those two dummies?

A. I think that would be right.

Q. You think the "Chester" was struck on her port side not far from her foremast?

A. Not far from the foremast, but abaft it I think.

Q. You do not know whether that made a raking wound or went straight in?

A. I cannot say; I was on the "Oceanic's" bridge all the time.

Q. From where you could see, could you see the water rushing into the "Chester" from either side of the bow of the "Oceanic?"

A. No, sir.

Q. The "Chester" was a good deal lower in the water than the "Oceanic," anyway?

A. A good deal lower.

Q. You say, as I understand, the same as Captain Meyer does, that you were about a quarter of a mile off from Point Diablo?

A. As near as I could estimate—a quarter of a mile.

Q. As you remember, your direction was about north northeast?

A. No, sir; about northeast half east.

Q. Northeast half east?

A. Yes, sir. Up to this first cross (pointing) it had been northeast by east. In order to carry out my wishes the pilot put her half a point more to the northward, in order to hug the north shore, which is the only safe shore to enter the harbor of San Francisco in foggy weather.

Q. How far were you from the north shore when the collision occurred?

A. About a quarter of a mile.

Q. At the time, or before the collision, did you see Fort Point at all?

A. I told the pilot I was watching to see if I could see Fort Point, but we were so far off Fort Point that I could not see it. I never heard any fog signal on Fort Point. I was watching for that. I told him I thought I could see the loom of the fort; I was not certain, but I could see Lime Point—the white fog-signal landing on it plainly.

The Court—Q. You say you could not hear the fog signal at Fort Point?

A. No, sir; you can never hear it unless you are right on top of it, or to leeward of it.

The Court—Q. What is the good of it?

A. None. When you are inside you can occasionally hear it, because you are to leeward of it and the sound is carried to you.

Mr. White—Q. Did you see Fort Point at all before the collision.

A. Not to swear to it.

Q. Did you see any high ground looming up over on that side?

A. On which side?

Q. On the south side?

A. No, sir.

Q. On the starboard side?

A. None.

Q. The fog was thicker on your starboard side than towards the north shore?

A. No sir; I could not say that.

Q. Was not the fog that morning floating around in clouds, sometimes settling in thick and other times blowing off?

A. Yes, sir; it would ease up and you could see quite a little distance, then it would shut down and you could not see barely a quarter of a mile.

Q. How was the water that morning?

A. Dead smooth.

Q. Do you know anything about the condition of the tide?

A. A good deal.

Q. What was it?

A. At that time, flood tide.

Q. That is, the tide was coming in?

A. Yes, sir; the tide was running into the port.

Q. You were riding in on the tide?

A. Yes, sir.

Q. How much clear water was there between you and the north shore, at your nearest point to the north shore?

A. A quarter of a mile, practically.

Q. Your nearest point to the north shore was the point of collision?

A. No, sir; I think about the same from Point Diablo to Lime Point; about the same.

Q. Why did you sound that second signal to starboard to the "Chester?" Why did you give that to the "Chester?"

A. Because we saw he was not acting according to his answer to the first.

Q. What was that given for; to ask him to starboard, or to order him to do so?

A. To verify the first.

Q. After having received his second signal, did you wait at all to see whether or not he was obeying it?

A. No, sir; because about that time we could see him swing rapidly as if acting on a port helm. I said to the Pilot, "What the devil is he doing?" and swung the telegraph "full speed astern."

Q. Did not the Pilot in answer to your question say immediately, "He has answered our signal; if he obeys it, it is all right?"

A. That was to the first signal. He said, "He has answered our signal; that is all right." It would have been if the ship had acted in accordance with it.

Q. After the first signal there was something that in-

dicated to you that he was not starboarding, before you gave the second?

A. Certainly.

Q. Then you gave the second?

A. Then he gave the second.

Q. You received the answer to the first signal clear enough that he would starboard?

A. Perfectly clear.

Q. Did you sound any alarm at any time?

A It was not necessary.

Q. I am not asking you if it was necessary. I am asking the fact?

A. We did not.

Q. Was there any signal of any kind from your ship that indicated to the "Chester" that you had given the order to go full speed astern?

A. It must have been very evident to anyone on the lookout on the "Chester" that the "Oceanic's" propeller was going full speed astern. Any seaman would notice it at once.

Q. Is there not a rule of signals by which one ship can signal to another that she is going astern?

A. There is.

Q. What is it?

A. Three blasts of the whistle.

Q. You gave no such signal as that?

A. No, sir.

Q. You did not give any signal of five or six sharp toots of the whistle as a danger signal?

A. We did not give that because it might have been confusing. We had no occasion to give it. We were ex-

actly according to our signals. If there was any danger, it ought to have come from the "Chester;" that is the ship that ought to have given the danger signals, indicating to me that he was unable to act on the understanding we had arrived at, that the helm should be starboarded.

Q. You saw he was not complying with it?

A. Exactly. The moment we saw it, we took every precaution to prevent any accident.

Q. You heard his signal agreeing with you to go to starboard, and at the same time that your hearing indicated that he would go to starboard, your sight indicated that he was going to port, did it not?

A. After the first signal he did nothing. The ship seemed to come straight ahead, therefore, we repeated the signal.

Q. Notwithstanding his signal that reached your ears that he would go to starboard, the sight you had of the vessel which was immediately almost, was it not—

The Court — I presume you want to be understood in the proper way. He was not going to starboard.

Mr. White—Q. The sighted indicated to you he was not going to starboard?

A. After the first signal the sight indicated he was not; therefore, we repeated the signal to see that he understood.

Q. After the second?

A. He repeated our signal to say he did understand.

Q. At the time of the second signal—the second signal was that he was going to starboard—the sight indicated to you he was not obeying the agreement?

A As I have told you once or twice, directly the sec-

ond signal was given, that he appeared to be going on the port helm, which would certainly throw the ships together, and, therefore, I gave the order and put the helm full speed astern myself. There was no danger, or should have been none, if that ship answered her starboard helm. Directly we saw she was acting on her port helm, we pu. the engines full speed astern.

Q. How soon after the first signal from the "Chester" did you get sight of her?

A. I myself had sight of her when the first signal was given.

Q. What direction did she appear to be taking at the time?

A. I know she was coming in end on to us about two and a half to three points on our starboard bow.

Q. Off that way (pointing).

A. Off that way. We were never pointing at him at any time.

Q. While her signals indicated that she was going to starboard, the sighted of the vessel indicated that she was either going to come straight towards you, or later than that was going to port?

A. The sight indicated that he would run into us if he did not carry out the signal we gave him and which he answered.

Q This difference between her signals which came to your ears and what you saw with your eyes created some confusion as to her in intentions in your mind, did it not?

A. There was no confusion in my mind.

Q. Are you familiar with the rules adopted by the

Treasury Department of the United States Government for the steerage of vessels?

A. Yes, sir.

Q. Were you familiar with this rule at the time of the collision? "Rule 3.—If when steamers are approaching each other the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within a half a mile of each other both shall immediately be slowed to a speed barely sufficient for steerage way until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

A. I believe that is the rule.

Q. I will ask you why it was, when the signals indicated that the "Chester" would pass to starboard and her position and motion and direction, as shown by your eye, indicated she was not obeying that order, why did you not immediately signify the matter by giving several short and rapid blasts of the steam whistle?

Mr. Barnes—I object to the question, because it is not founded on the rule at all, nor is it applicable to the facts. That is a rule directed to control the action of pilots or persons in charge of ships when there is a misunderstanding. There was no misunderstanding here. The first time they signalled, they gave the two blasts. They were answered by the two blasts. She got in sight, and they saw she was not doing what she said she would do. They repeated the signal and it was answered, as I understood

Therefore there was no confusion, and the rule does not apply. The question asked does not cover any single fact as developed by the testimony.

The Court— That is the testimony of Mr. Meyer. Mr. Meyer testified that there was no misunderstanding.

Mr. Barnes—The captain himself has just so stated. The rule interrogated of by counsel has no application.

The Court—I do not think that on the testimony as it now stands the question can be predicated on his statement.

The objection is sustained.

An adjournment is here taken until to-morrow morning, Friday, September 8th, 1893, at 10 o'clock.

Tuesday, September 12, 1893.

John Metcalfe. Recalled.

Mr. White—Q. Captain, was there any uncertainty in your mind as to the intention of the "Chester" from the time you sounded your first signal to her and received your reply, up to the time of the collision?

A. Not until after the second two whistles had been blown.

Q. How was it after the second two whistles had been blown from your ship?

A. Well, the "City of Chester" seemed to be acting on her port helm instead of her starboard helm, as his answer to our signal led us to believe he would do.

Q. Was there any uncertainty in your mind as to the

course of the "Chester" from the time of your first signal to her and her answer, up to the time of the collision?

A. After our first signal to starboard was answered by him, naturally, we had no idea of any uncertainty at all. I simply thought he would starboard his helm as he intended to do, as the signal conveyed the idea to us, and he would pass along clear of us.

Q. Your answer now, as I understand it, applies to the intention as indicated by her signals?

A. Naturally.

Q. As to the course that the "Chester" actually was taking, was there any uncertainty in your mind as to what she was doing, or intended to do?

A. As I before stated, not until after the second signal was given.

Q. How far apart were the two ships at the time the first signal was given and answered?

A. About half a mile.

Q. And at that time could you and did you see which way the "Chester" was headed?

A. She was heading right for us, straight; all masts and funnel in line. If anything, we could see probably a little more on the starboard bow.

Q. If you were to indicate what courses the ships were taking, would you say they were head on, or on crossing courses at that time?

A. I should say she was on our starboard bow. She was end on us. We were never at any time end on to her.

The Court—Q. Did you say you could see more of her starboard bow than you could see of her port bow?

A. I think so, probably a little more, but very little.

She was so nearly end on that you might call it end on.

Mr. White.—Q. She was on your starboard bow ?

A. Yes, sir.

Q. And end on towards you ?

A. Heading right for our bridge, apparently.

Mr. Barnes—Q. Won't you take those two models and give the Court an idea of the general position that she occupied ?

A. That is about the line (illustrating), so that I, looking from this bridge, could see the ship end on—perhaps a little more on this bow than the other. It might be called end on.

Mr. White—Q. So that if the lines of the apparent course of the ship at the time you first saw her had been produced, they would have crossed each other.

A. Yes, sir ; that is, if the line of the course of the "City of Chester" had been carried along and prolonged, it would have crossed the "Oceanic" somewhere about the funnel or the bridge ; the line of the course of the "Oceanic" being prolonged would never have touched the 'City of Chester."

Q. It would not be necessary to prolong the line of the course of the "Oceanic" at all in order to produce the crossing effect ?

A. No, sir, it would not ; not to produce the crossing effect. The only line to be prolonged would be the course of the "City of Chester."

Q. Did you know what steamer that was at the time ?

A. I had no idea ; no, sir.

Q All you knew about that was that the pilot had told you some steamer would come out ?

A. He told me some steamer would leave Broadway wharf at about nine o'clock in the morning.

Q. How much time relapsed, as nearly as you can tell, between your first and second signals to the "Chester" to starboard the helm?

A. Probably two minutes, as near as my memory will serve now.

Q. I will ask you whether there was any way that you could have avoided the collision if the steamer "Chester" had kept what was her apparent course at the time that you first saw her?

A. If she had maintained the course she was steering when we first saw her, the chances are, that if we had gone full speed ahead, we might have crossed her bow.

Q. How would it have been if you had gone at dead slow, the same as you were going?

A. Well, the chances are then she might have hit us somewhere about the after end of the ship, but still, that is only a supposition on my part. I do not know. She might have cleared the ship.

Q. Suppose she had kept her apparent course of head on toward you, or had turned as she did on her starboard; and you had at the first signal gone full speed astern, what would probably have been the result?

A. The first signal of the two whistles?

Q. Yes.

A. I do not know what would have been the result at all, because that is simply an impossibility to do. When I give a signal that I wish to pass the starboard side, I do not propose to go full speed astern or do any such unseamanlike act.

Q. I will ask you the question again. What in your judgment would have been the result if she had kept the course that she actually did keep, making the turn as she actually did, and you had given the order, and the order had been obeyed to keep your ship full speed astern at the time the first two signals were sounded. Would there or not have been any collision ?

A. I cannot say.

Q. You testified on Thursday that you knew it was flood tide at that time. I want to ask you now whether you were familiar enough with the tides to know that at flood tide the tide strikes strongly here on the south shore off from Fort Point, and is then deflected, so that it carries quite a strong tide or strong current from the direction of Fort Point across towards Lime Point; you knew that, did you ?

A. I know that the flood tide in making in; makes in on the south shore, and strikes the land just outside of Fort Point, and is deflected in line with that land towards Lime Point, and runs across the channel a certain distance, and then takes the same course as the true tide coming in amidchannel and north.

Q. You knew then, at the time of that flood tide, there is a cross-current to some extent across the channel there caused by the tide ?

A. To some extent across the channel, yes.

Q. The current running from the south or Fort Point side over towards the north side ?

A. Over towards Lime Point; nearly due north.

Q. Of course you knew, Captain, that any vessel cross-

ing that current at an angle would be influenced to some extent in her course by the tide?

Mr. Barnes—I desire to make the point here, and take the ruling of the Court upon it, because I do not desire the evidence to even be submitted without an objection. I object to this query as to the tides, upon the ground that it is wholly immaterial. I do so upon authority. So far as respects danger to vessels at anchor, the speed of the other ship over the ground, and the condition of the tide, and not its speed through the water, are to be considered, and in all cases where one ship is at anchor and the other at motion, the strength and the direction of the tide must be taken into account, but where both vessels are in motion, neither at anchor, the question of tide becomes wholly immaterial.

The Court—Without regard to whether the motion is—

Mr. Barnes (interrupting)—Accelerated or diminished. That is upon the very highest authority. I call your Honor's attention to Marsden on Collisions at Sea, page 352, and the cases there cited. That rule has been followed in all the English maritime cases, and in our own. The argument upon which the rule is founded, is quite obvious, I think. The tide becomes immaterial, because both vessels are at liberty; both are under command, both are supposed to know, and the one ship is not more responsible for the condition of the tide than the other. Apply the rule to this case. Of course, as far as a landsman can penetrate into the views of a master mariner, like my friend on the other side of this case, it is somewhat apparent that his object by this series of questions is to show that with the young tide there was a strong set against

the south shore deflecting the volume of water towards the center of the channel between Lime Point and Fort Point, and then carrying it away; that he knew, we will say, or ought to have known, that when the nose of the "Chester" was poked out from behind Fort Point, she would strike that current, and would be, *nolens volens*, rudder to the contrary, notwithstanding, swept away to the starboard, or swept to the right or the left, as the force of the current might take her in going in or out, and that that was something he ought to have calculated for. I say, if there is anything in the question it is that. The argument is applied right the other way. The "City of Chester" was in that tideway, and the "Oceanic" was not. The extent or the force of it operating upon the "City of Chester" was that which those in command of the "Chester" knew or ought to have known. It was not for a man half a mile away on the other side of the entrance to the harbor, proceeding in his vessel according to the rules of navigation, to know or to understand, that the "Chester" was, or might become, unmanageable by reason of the tideway. That goes back again to still another proposition, and that is that in estimating the risk of collision, the "Oceanic" was not bound to take into account or consider at all the ability or inability of the "City of Chester" to mind her helm. or to do what her thinking part, her Captain, agreed she should do. Those possibilities are upon well-established authority, and one case in which it is very thoroughly raised, is the case of the "Nichols," in the 7th Wallace, where that rule is laid down on a long course of authority ; that in those propositions of navigation it is not a possibility, as applied to this case, that the Captain of the "Oceanic" ought to

have calculated upon when he gave a signal to starboard the helm, or send his ship off to the left, and he was doing it, to calculate that possibility the "City of Chester" that had heard his signal, that he was going to the left, and had answered that it would go to the left, thereby each passing on the starboard side, it was not for him, I say, to calculate the possibility that either from defective condition of the helm, or the steering apparatus or tideway, or anything else which might affect a vessel in motion, could happen, so as to bring about a collision. All those circumstances are not circumstances when vessels are in motion, that are to be taken into consideration. For that reason I object to this inquiry as to the tide, because it was a tide in which the "Oceanic" was not moving. The disaster could in no sense be traced to anything that happened to the "Oceanic" by reason of the tideway. If it happened to anyone, it happened to the "Chester," and, therefore, became *pro hace vice* actually and utterly immaterial.

The Court—What have you to say to that Mr. White?

Mr. White—In listening to the argument of counsel I have been in doubt as to whether he advances this proposition as one of law or one of fact.

The Court—He refers to a case decided in the 7th Wallace, wherein the matter is discussed, and I judge from his statement of the case, would be one of both law and fact.

Mr. White—From my examination of the authorities, and I have quite a collection of them here, I find there is once in a while a case that signifies something in the direction of his contention, but by far the majority of the cases are directly to the contrary. The rules of navigation to

prevent collisions are, that one vessel has no right to adopt a particular course for herself and rely upon the other one doing everything that can be done to keep out of the way. In other words, it was the duty of the "Oceanic," as I shall contend, and I can furnish the best of authorities for that proposition, both English and American—it was the duty of the "Oceanic" and her officers to know the condition of that tide and to reasonably know that under the rules of navigation any vessel whatever, and particularly a small vessel like the "Chester," being caught in the tide would sheer off and be carried away by that tide to some extent, and to make allowance for it. An exaggerated case is permissible by way of illustration. Suppose the fact to have been here that this tide set up so strongly across here as to strike hard against that north shore, so hard that it was next to impossible for any vessel to go in and out there on account of having to fight out against this side drift that this strong cutting across there would give it, so that they had to use their entire steam power and had to fight directly south against the tide in order to get out. The general's contention is that the "Oceanic" coming in here, and knowing well that fact, and knowing that whatever vessel came out here and struck that tide would be carried off there in spite of all she could do if she had the strongest of engines and the strongest and most approved machinery in every respect; in spite of all that could be done, the condition of that channel was such that the 'Chester" or any other vessel would be carried across there within 10 or 15 rods of the north shore, yet his contention is that they do not have to pay any attention to that whatever; that they can insist that the "Ches-

ter" shall go on a straight course through the tide, when it is an impossibility, and that they can frame their course accordingly. I do not claim that the condition of affairs is actually such an exaggerated condition as that. I do claim that all the authorities show that it is the duty of expert mariners to know at the ports they are coming in the condition of the tides and to know the condition of that harbor and that port and to make the proper allowance, in attempting to pass another vessel, for the influence that the tide would have upon her.

The Court—The difficulty about your position is this, that the "Chester" signalled that it would go to the starboard; that it would take the "Oceanic" on its right, the "Chester" passing to the left of the "Oceanic" going out. That signal was made by the "Chester," and, presumably, in view of all the contingencies that were operating on the "Chester," its own ability to obey its helm, its steam power, the power of the propeller, and with a knowledge on the part of the officers of the "Chester" as to the condition of this tideway. Here is a vessel that is going out to sea. It is going against a tide coming in. The "Oceanic" is coming from sea, and coming in on the young flood. There are, perhaps, some cases which go to the extent of holding that a vessel coming into port on a flood tide is required to be careful, and to use all precautions that can be observed for the safety of the vessel, but the point in this case is that the "Chester" had signalled, giving the two blasts of the whistle indicating the position that it would take with respect to its departure from port. Now, then, the master of the "Oceanic" accepted that signal and governed its operations or its movements accordingly. In

view of that, it is relevant for us to consider the condition of the tide for the purpose of determining the conduct of the officers of the "Oceanic." It is very material probably for the purpose of determining the conduct of the "Chester."

Mr. White—What your Honor says would be pertinent to a case pending between the "Chester" and the "Oceanic," to determine which of them were to blame, but no negligence can be imputed to the passengers on the "Chester," even if the "Chester" was negligent. That is not a question between the two ships of comparative negligence. That is held universally to be the rule. If one ship is grossly and criminally negligent in her management, and the other, as the English authorities express it, is guilty of a venial fault and one that could be easily forgiven, the rule is to hold both of them responsible. It was held in the case of the "John H. May," in the 52d Federal Reporter, 882, and also in the "Intrepid," 48th Federal Reporter, 327, that it would be inexcusable negligence for the owner of a steamer not to be acquainted with the state of the tide.

The Court—Which was it in that case, his ship or another ship?

Mr. White—That was his ship. In the case of the Gloucester Ferry Company *vs.* The "Rescue," a case from the Eastern District of Pennsylvania, it was held that a steamer approaching a wharf, was bound to notice the visible effect of a tide on another steamer coming out from the wharf, and they were both in motion, one going in and another coming out. The incoming vessel was held responsible.

The Court—That was a very different matter from the law of the road. What we are called upon to examine in his case is, what is called the law of the road.

Mr. White—The law of the road will not permit one to take the left hand side of the road when he knows there is an impassable mudhole or rock that one on the other side is necessarily bound to go round. In other words, the rule is, that both parties must make such allowance and give such broad road to the other that there will not be any collision in any event.

The Court—This probably may be a vital point in this case. The Court is willing to take it now and strike it out hereafter upon argument, or hear the argument now fully, whichever will be the most convenient.

Mr. Barnes—I presume you might take the course that your Honor's distinguished and deeply regretted predecessor was in the habit of taking in cases of this character. He would say, "Well, I am sitting here by myself, and if I should be satisfied that I had made a mistake, if I ruled out this testimony, it would be irremediable mischief; if I am satisfied it ought not to be entertained, you know very well I will not entertain it." At the same time he always insisted, and I think that seems to be the general drift of the broad principles upon which these admiralty cases are universally heard, that whenever a question of this kind comes up, the counsel shall state the point, and the Court then takes it subject to the objection, and to consider more deliberately than would be possible if he had a jury in these cases, whether it ought to be given any weight or not. For that reason I called your Honor's attention to it. Sub-

ject to that proviso, I see no reason why it should not be permitted to be stated.

The Court—I think that will do. The case might turn on some other point, and the time of argument would be pursued uselessly.

Mr. Barnes—That is without waiving the position for which we contend, that the moment the signal given by the "Oceanic" was understood and answered by the "Chester," when they were at sufficient distance to have passed starboard to starboard, and without any danger, if the "Chester" had been manageable in that tideway, that that relieves us from any consequence of a disaster happening by reason of the "Chester" getting in a tideway that swept her across that channel and into us. That is the proposition.

The Court—Then the objection of General Barnes to this testimony will be overruled, subject, however, to further consideration in this matter hereafter.

Mr. Barnes—Either by counsel on a motion to strike it out, or the Court itself, when it comes to considerthe case.

Mr. White—Whichever way the ruling finally goes, the other party will be entitled to an exception.

The Court—Yes.

Mr. White—Read the question, Mr. Reporter.

(The reporter reads the question as follows: "Q. Of course you knew, Captain, that any vessel crossing that current at an angle, would be influenced to some extent in her course, by the tide?"

A. It would all depend upon the position of the other ship as to that particular tide.

Q. Will not a ship crossing not at right angles, but at an acute or obtuse angle cross a strong current, be carried off from her course to some extent by that current ?

A. Not unless she is going from still water into a cross-current. If she is in the cros -current all the time it cannot interfere with her steering.

Q. Supposing the current out of which the "Chester" had come before she entered this current caused by the tide, and goes off to the north, had been a current going to the south, would she not have been influenced in her direction by entering this current that goes to the north ?

A. If she is in a current completely setting to the south, her general set would be to the south. It would not necessarily interfere with her steering. As I said before, if she went from comparatively still water into a cross-current, her course would be influenced by the set of the tide that she was going into.

Q. Suppose she goes from a current setting to the south probably into one setting strongly to the north, would she not be interfered in her course by this ?

A. Certainly.

Q. If she goes from a still water into one setting strongly either way, she would be influenced by it?

A. Certainly.

Q. You say you knew that this current set strongly across here from Fort Point at the state of the tide, over towards mid-channel?

A. Somewhere in that direction, yes.

Q. In the direction of mid-channel? Did you make any allowance in your arrangements for passing the "Chester," for the sheer that this tide would give her?

A. I most certainly did not, because I did not know the position of the "City of Chester" with reference to that tide. It would be absurd for me to make any possible arrangements for her navigation, when I could not tell her position with respect to that tide. If the Captain of the "Chester" was satisfied that that tide would prevent him acting on his starboard helm, it was his duty to signify that to me by the danger signal or going astern, and I would have done the same.

Q. You relied upon the "Chester" entirely on that question?

A. I relied upon the seamanship of the Captain of the "City of Chester" carrying out the whistle signal that we had each given and answered.

Q. You could see Lime Point quite plainly at that time?

A. No, not quite plainly; I could distinguish the white signal house.

You had seen Point Diablo quite plainly?

A. I had seen Point Diablo quite plainly.

Q. You knew almost to a certainty what her position was?

A. I knew from the position pretty nearly.

Q. You knew from the direction of your vessel being northeast, half east, exactly what direction you were heading?

A. Yes, sir.

Q. You knew almost to a certainty the direction you were from Fort Point?

A. Yes, sir.

Q. And from this shore outside of Fort Point?

A. Naturally, I knew where Fort Point ought to be.

Q. As soon as you saw the "Chester," you knew almost to a certainty what her position was in the channel ?

A. Allowing her to be a half mile on my starboard bow, I knew pretty well where she was ; yes.

Q. Putting all this information with your knowledge of the direction that this tide ran, did you not know that the "Chester" would be caught in the tide?

A. Assuming that the position of the "Chester" to be half a mile from me on my starboard bow when the first signal was given, she was not within the influence of that tide rip, in the neighborhood of Fort Point. If her helm had been starboarded then, which is usually done by every steamer going out of the port on flood tide in order to make that rip, she would have recovered herself very quickly, and gone on about her business.

Q. I will ask you if you can, in answering my question, to refrain from stating what the "Chester" ought to have done ?

The Court—You called for that.

The Witness—You are asking me what the "Chester" was doing, and what the ideas of her Captain were, and I cannot tell them.

Mr. White—Q. I am asking you about where you were and what you knew about the situation ?

The Court—I think he is answering your question, Mr. White.

Mr. White—Q. In steering the "Oceanic" and making arrangements to pass the "Chester," did you make any allowance whatever for the sheer of the "Chester"

caused by this tide, running from Fort Point up to Lime Point ?

A. No, sir ; I do not think I did.

Q. You knew it ran there ?

A. Yes, sir. I did not know the "City of Chester" was in it.

Q. You knew the "Chester" would have to pass through it ?

A. Sooner or later, but what time I could not tell.

Q. You knew the position of the "Chester" at the time you first saw her ?

A. Mr. White, I could not estimate the position of the "Chester" so closely as to tell when she would cross that particular rip. That tide sets across there in a distinct line. It was impossible for me to look out for my ship and my navigation, and watching the "Chester" to tell when she was approaching that line with sufficient certainty to base my own action on it.

Q. Did you give the matter of the "Chester" being caught in that tide any consideration whatever ?

A. I do not think I did. I left that to the Captain of the "Chester."

Q. I understood you say, Thursday, that to have sounded the danger signal would have caused confusion. I will ask you now, if you had sounded the danger signal, would not your crew have been better prepared to have got out their boats more promptly than they were ?

A. Not any better prepared.

Q. Would they not have been more on the alert ?

A. Not any more on the alert.

Q. If you had sounded a danger signal ?

A. The danger signal is not a signal to get out the boats on the "Oceanic," or any other ship at sea, that I know of.

Q. Then your crew would not have been waked up by a danger signal being sounded ?

A. They did not require any waking up; they were wide awake.

Q. What kind of a crew did you have ?

A. A mixed crew.

Q. What were they ?

A. Europeans and Chinese.

Q. About how many of each race ?

A. I do not remember the exact number on that voyage. I think probably 70 Chinese and about 35 or 40 white people.

Q. What position did the white men have ?

A. Officers.

Q. The common sailors of your crew were all Chinese ?

A. All Chinese.

Q. If you had sounded a danger signal at the time you first noticed that the "Chester" did not appear to be minding her helm, would that not have been a warning to the crew of the "Chester," so that they could have got out their boats earlier ?

A. I doubt it very much.

Q. Why ?

A. Because, as I have before stated, the danger signal is not a signal to any crew of any ship that ever I heard of, to attend to boats or anything else.

Q. Is not the danger signal one that the crew all understand ?

A. It is very questionable. It is only a danger signal between the two captains. It is an intimation of lookout.

The Court—Q. It is a signal that relates to navigation ?

A. It is a signal that relates to navigation, and it is understood by the two masters of the ships, and probably the officers, but not as a rule by the crew.

Mr. White—Q. It is a signal that is intended to convey the idea, that unless very prompt measures are taken one or both ships may go to the bottom, or some other thing ?

A. No, sir ; excuse me——

Mr. Barnes—I object to that question. Mr. White is not testifying. If he wants to know what a danger signal is, let the old salt stand back and the landsman speak.

The Court—I sustain the objection.

Mr. White—We except.

The Court—You understand what the objection is, Mr. White. You can ask the witness what a danger signal is.

Mr. White—He has already given that.

The Court General Barnes insists that you shall not inform the witness what a danger signal is an put that in the record as testimony.

Mr. White—Will you give me the dimensions of the "Oceanic," if you can ?

A. 438 feet long, by 40 feet 9 inches wide, 29 feet deep.

Q. How long were you her captain ?

A. Twelve years.

Q. Do you know upon what radius she would turn so as to go the other way, in smooth water, when going at full speed?

A. We have never tried it.

Q. Without attempting to give absolutely an accurate answer, tell us about how much water was required to turn the "Oceanic?"

A. Going at full speed?

Q. Going at full speed.

A. Certainly not less than a mile.

Q. It took a mile of water for her to turn round?

A. Yes, sir; to turn completely around; that is approximately as far as I can judge.

The Court—Q. Is that the diameter or the circumference of the circle?

A. The diameter.

Q. The vessel at the time describing about three miles of a circle.

A. Running around about three miles of a circle.

Mr. White—Q. I ask you the radius on which she turned taken from a circle which I understand would be 2500 or 2600 feet?

A. Half a mile.

Q. About how many times did you bring the "Oceanic" in and out of the harbor of San Francisco?

Mr. Barnes—Do you mean prior to this time?

Mr. White—Prior to this time, yes.

A. About 40 to 50 times; I don't remember now.

Q. When did you leave the "Oceanic"?

A. In 1889.

Q. What business are you now engaged in?

A. Surveyor to Lloyd's Register of British and Foreign shipping.

Q. What time in 1889 did you leave her?

A. June, I think.

CROSS-EXAMINATION.

Mr. Barnes—Q. How long have you been going to sea, captain?

A. Up to the time I left the "Oceanic," 28 years.

Q. Do you hold a master's certificate?

A. Yes, sir.

Q. How long have you held it?

A. Since 1867 or 1868; I am not sure which.

Q. At the time of this accident, the 22d of August, 1888, how long had you been in command of the steamship "Oceanic"?

A. About 11 years, I think; 11 or 12; one or the other.

Q. Before you were master of her, had you occupied any other position with respect to her.?

A. None.

Q. Then from first to last you were her commander?

A. From first to last.

Q. During the time you were on board of her had she made any other voyages than those between this port and the Asiatic ports?

A. Yes, sir; from this port to England via China and back.

Q. Were you in command of her on that expedition?

A. I was in command of her.

Q. What was her tonnage?

A. 3,808 close tonnage.

Q. What was her length?

A. 438 feet.

Q. Beam?

A. 40 foot, 9.

Q. Draught?

A. Down to her marks, 25 feet.

Q. When you say "down to her marks," what do you mean by that?

A. I mean down to the draught of water and freeboard that Lloyd's rules would allow her to go.

Q. And that was indicated upon the side of the ship at this time. How many passengers did you have on board of the ship of one kind and another?

A. I am not sure; but somewhere in the neighborhood of 1000.

Q. What was her complement, with reference to crew, sufficient?

A. Ample in every way.

Mr. Barnes—I am asking these questions, if your Honor please, because I do not know, except as we are able to get at it, what it is the plaintiff here complains of. There is a general sweeping allegation in the libel as to the ship and her management, but in default of that we are obliged to go over a broader ground than I otherwise would, or if the counsel would state even now what it is he relies upon in the way of either defective handling or crew, or any other thing which was the approximate cause of this disaster, in the way of negligence for which we are responsible, we should be glad.

The Court—I infer from his statement, and what he said a moment ago, that his claim is that notwithstanding it may be assumed that the "Chester" was at fault, perhaps grossly at fault, if the "Oceanic" was at fault, even in the smallest degree in this collision, that then these people who were killed or drowned have a recourse against the "Oceanic" for whatever negligence or bad conduct was to be attributed to that vessel. That being the case, I should imagine that it will devolve upon you at some time or the other in the course of this defense, perhaps not now in cross-examination, but at some time or other, to meet all these issues. Is not that correct, Mr. White?

Mr. White—Yes, sir. My position is this: These two vessels, as compared with each other, may take any one of four positions. Both may have been perfectly free from blame, in which event the defendants would be entitled to a judgment. The "Oceanic" may have been free from blame and the "Chester" blameful, in which event the "Chester" only could be held.

The Court—And the "Oceanic" go free?

Mr. White—And *vice versa* if it was the other way, or they may both be at fault, or in which case the "Oceanic" may be held. One of those positions may be eliminated entirely from this, because a collision like that cannot occur out there on a morning when the water is as smooth as glass and with a light and variable fog, and both of those ships be blameless. That part can be eliminated; if I can show that either or both of these ships were in fault, or that the "Oceanic" was in fault, I claim to be entitled to a judgment for the Plaintiff.

The Court—That will involve a defense on their part

that the vessel was suitably equipped in every respect and every particular and every detail, and so equipped as to be provided for every emergency that did arise on that morning, and that everything was done by that vessel that was proper and necessary to be done in view of the situation.

Mr. White—We may eliminate from that the question of the equipment of the "Oceanic," with perhaps the exception whether she had a proper and sufficient crew; that her appointments were sufficient, her steering apparatus and everything of that kind was of modern kind and reasonably the best, I make no question. I stopped the cross-examination upon that point the other day, saying I made no question on that point.

The Court—I will not discuss the matter any further; I was simply trying to find out what the issues were. As I understand, then, you make no point on the equipment of the vessel so far as the power of her engines and her steam power is concerned?

Mr. White—Nothing of that kind.

The Court—Nor the propeller?

Mr. White—No, sir; her steering apparatus and all her mechanical appointments were sufficient so far as I know.

Mr. Barnes—We are still as far from a comprehension of the matter, so far as the statement of counsel is concerned, as we were when we began this desultory talk. It is conceded now, as I understand, that everything was right about the "Oceanic" except, perhaps, her crew. What counsel means by that I do not know. It certainly is not claimed or pretended that because there were a proportion of Asiatics on board this ship employed as seamen

or in the different departments of the vessel that that employment was attributable at all to this collision; that cannot be claimed. I do not suppose it is, nor do I suppose there is anything in the Chinese portion of this proposition that would be of any effect or influence with any court than one over which the Honorable Dennis Kearney might preside. There it would be of some use perhaps. But here, I take it, it is of no force whatever. Then it comes down to some question of negligence or wrong doing in navigation purely and simply. I say, we bring this case to a point, and try it on that point, if the counsel will say what he claims we did that we ought not to do and what he claims we did not do that we should have done. If we can bring the case down to that point, all the rest of this matter becomes actually immaterial; and I think it will be for the advantage of both sides. If the proposition of counsel is, as he would seem to indicate, that it was the duty of the captain of the "Oceanic"—I say the "Oceanic" because I concede that the negligence of the "Chester," or those in command of her, cuts no figure whatever in this case; that she may have been ever so wrong, the negligence, if there was any, which I do not claim, on the part of the "City of Chester," is not to be imputed in the language of the law to the passengers on board the "Chester," though it might be imputed to the owners of the "Chester" if they were conducting a proceeding against the "Oceanic" for damages resulting from the collision; but so far as these plaintiffs are concerned, no matter what mistake, error or fault there was in the navigation of the "Chester," it is not to be imputed to the passengers or people who had life or property on board that ship. That proposition is beyond

any dispute; but the case must turn not on the fact that a collision occurred, but that the "Oceanic" did something which it ought not to have done or omitted to do something which it ought to have done. Is it not the fairest way for the counsel to say, "I intend to claim in this case that when the first signal to go to the left was given by the "Oceanic" she had no business to proceed at all, she ought to have stopped right there." Then we have got to a problem that has to be worked out. If his position is, that when the second signal was given we did not go full speed astern as quick as we ought to have done, or that our duty was, when we had given one signal, to do something other than that which the signal said we would do, and which it was understood we would do, why then have we got a proposition to discuss. What the use of beating all round the bush is, is a puzzle to me, and is not in accordance with the ordinary method of trying these cases. I say if counsel will say what it is he finds fault with, we can go straight to that proposition, and try this case in a week instead of five.

The Court—The new rules prescribe for the trial of collision cases in the southern district of New York, provide for the development of an issue such as General Barnes has described. Mr. White, if you are prepared to state your position, it might somewhat shorten the proceedings.

Mr. White—I suggest it would be better to finish the cross-examination of this witness before we do anything of that kind.

The Court—Proceed, General.

Mr. Barnes—Q. How was the crew as to seamanship and ability to handle that vessel under your orders?

A. Excellent.

Q. Was there anything in the circumstance that a portion of the crew belonged to one of the shaded races of Asia that made them less competent than men of any other race to do what was necessary to navigate that ship?

A. After a great number of year's experience I found the Chinese the best sailors I ever had on board of a ship for any purpose whatever.

Q. Were the men on board this ship competent navigators and handlers of that vessel under your orders?

A. Perfectly competent seamen in every way.

Q. How were the different portions of the ship which related to her handling, as to their being in good order or the reverse?

A. Very good order.

Q. What were the steering qualities?

A. Very good indeed.

Q. Was she in as good a condition and capacity to be steered and handled as any ship of her size and class?

A. A better steering ship than any afloat, I believe, of her size.

Q, Do you know the value of such a steamer as that?

A. Approximately, yes.

Q. How much?

A. Well, the ship cost £125,000 when she was new.

Q. That would be how much in real American money, not silver?

A. About $800,000, gold.

Q. Did she have a cargo aboard at that time?

A. A very valuable cargo.

Q. Can you state to the Judge, approximately, what

the value of the cargo you had on board at that time was?

A. Not less than $1,000,000.

Q. And passengers about 1,000.

A. As near as my memory carries me, about 1,000.

Q. Were you acquainted with the rules provided by the laws of the United States for the government of steamers and vessels proceeding in fog in coming into harbor or roadsteads?

A. Yes, sir.

Q. What did you do in compliance with those rules from the time you approached, say, Point Bonita?

A. We kept the whistle going at intervals of about half a moment, and in the neighborhood of Point Bonita placed the ship at dead slow.

Q. What do you mean by the term of "dead slow"?

A. It means on board of the "Oceanic," and most of the ships of the Occidental & Oriental Steamship Company, a speed that will just enable the engines to be turned over and give the ship steerage way.

Q. When you say "dead slow," you mean speed sufficient to subject the vessel to the command of her helm and nothing more?

A. Just sufficient for that.

Q. How long prior to this collision had she been proceeding at dead slow, say, with reference to Point Bonita?

A. It would be a difficult thing to state the precise time that she had been going dead slow, because the engines had been worked in accordance with the state of the weather. They had been going from half speed, slow, dead slow, and stopped, as occasion required.

Q. What was the cause of the change in speed in the degrees you mentioned?

A. The varying degrees of thickness of the fog.

Q. When it was light and you could see, you let her go a little faster?

A. Yes, sir.

Q. When the fog settled down you slowed her or stopped her or made her go dead slow, just as the occasion demanded?

A. Just as the occasion demanded.

Q. When you first signaled the "Chester," you gave signals indicating that you intended to go to the left?

A. Yes, sir.

Q. She answered that signal, as I understand, in a way that said to you in marine parlance, "I am going to my left." If that signal had been obeyed, will you show the Court how those vessels would have passed one another, what side—to what side?

A. Coming this way, they would have gone this way past each other (illustrating.)

Q. If at the time the first signal to go to the left was given and responded to by the "City of Chester," she had gone to the left and you had gone to the left, or kept on your course, was there then the slightest degree or possibility of a collision between those vessels?

A. Not any. The "City of Chester," if she had altered her course to the left one point, would never have touched the "Oceanic."

Q. When the second signal was given to go to the left, if she had then—after responding to your signal that she would go to the left—had in point of fact gone to the left,

would there have been any collision possible between those ships?

A None, sir.

Q. I understand you to say, that immediately upon (perceiving) that notwithstanding she had understood both your signals and responded to both signals, she was still not going to the left, but was continuing to the right, what did you do?

A. Put the engines full speed astern.

Q. Between the time that you discovered that she was not doing what she had agreed to do, and your sending your ship full speed astern, how much time elapsed?

A. Not more than a half a moment. Less.

Q. Was it any more time than was necessary to enable yourself and Pilot Meyer to locate and recognize the fact that she was not doing as she had agreed to do?

A. Just sufficient time, in our judgment, to see that the ship was doing exactly opposite to what she had agreed to do. The only course then, was to go full speed astern.

Q. When the ships came in contact, did you see how the "Chester" came aboard of you?

A. Not for certainty. I think I could place the ships about in the position they came together.

Q. Will you do that with those models?

A. I think, as near as I can remember, that is about the position of the ships when they came together (illustrating).

Q. Do you know what the size of the "Chester" was, as to her length?

A. I cannot tell.

Q. Do you know her tonnage?

A. I have no idea; about 1,100 or 1,200, I believe.

Q. Are you able to state whether those models are about in the proportion of those vessels?

A. I think that they are about in the proportion.

Mr. Barnes—I will state, as a matter of fact, that they are drawn to a scale and in proportion, and we shall be prepared, whenever it is necessary, to establish that fact. They were built under measurement, and are correct on a scale, both as to comparative size and everything else.

Q. After the accident, did you examine the "Oceanic" to see whereabouts she had been struck or damaged in the collision?

A. Yes, sir.

Q. How soon after the accident did you look at her?

A. I suppose about an hour.

Q. Where was she then?

A. At anchor off Black Point.

Q. Where was she injured, if at all?

A. On the starboard bow above the water line some distance; I do not remember exactly how far above the water line.

Q. Was there any injury done to her port bow?

A. None.

Q. Assuming now, that those ships came together, and that the only injury found on the "Oceanic" was an injury to the plates on the starboard bow at some distance above the water line, and no injury whatever had been done to her on the port side, what would that indicate to you with reference to the collision itself?

A. It would indicate that the "City of Chester" had run into the "Oceanic."

Q. What would have been the probable consequence if the "Oceanic" had run into the "City of Chester"?

A. More than likely the damage would have been done on both bows of the "Oceanic."

Q. Captain, won't you please turn to that bromide print of the "Oceanic" on your left, and show the Judge where your officers were stationed on that morning coming into port?

A. I was standing near that telegraph on the bridge. The pilot was amidships over the port hole over the wheel house. The second officer was attending to the whistling lanyard. The fourth officer was down at the door of the wheel-house noting the time of the alteration of courses, and watching that the helm was put in the way ordered from the bridge. The chief officer was standing forward here by the foretopmast stays. The carpenter was near to him then, and most of the chief officer's watch were on this whaleback just in the wake of the forestays. A quartermaster was stationed here just foreside of the foremast to keep a lookout and pass orders between the bridge and chief officer. The third officer was aft looking after the steering engine with a portion of his watch, in order to put the hand gear on if anything happened to the steering gear, which is always done on entering ports.

Q How with reference to the crew?

A. Their stations are forward here about the anchor ready for anchoring, A part of the crew was aft here. The quartermasters are on the quarter-deck here attending to passing the word along to either end of the ship.

The Court—Q. This is a steam steering gear?

A. It is a steam steering gear that we use.

Q. And only one man at the wheel?

A. One man at the wheel.

Mr. Barnes—Q. Under the observation of how many men was he?

A. Three others. The second officer's watch stops in after end of the ship ready to put the hand steering gear on and steer her, if necessity calls for it.

Q. Was there any officer of that ship on that morning coming into port who had not his station, or was not at it?

A. None; they were all at their stations.

Q. How many men were forward on the whaleback with the first officer, approximately?

A. About ten.

Q. What were they sent forward to do? What was their business there?

A. To carry out the instructions of the chief officer and keep a good lookout in foggy weather.

Q. That was the duty of every man forward there?

A. At that particular time entering port, all hands forward were on the lookout both ahead and on each bow.

Q. When you signalled the "City of Chester" that you would go the left, did you put your helm starboard, so as to carry that promise into execution?

A. The helm was put hard starboard at once.

Q. Won't you tell the Court more fully, in reply to the question of Mr. White, how many boats there were on the "Oceanic," how they were hung or carried, and what their position and condition was in coming into port that morning, with reference to facility and ease of lowering and handling in the water?

A. There are two boats here in the way of the main-

stays, foreside of the mainmast; two boats just foreside of the funnel; two more just baft; two more just abaft that opposite the engine room skylight; two more opposite the No. 4 house, just before the jigger-mast, and two more on top of the after-wheelhouse. The two boats just foreside of the funnel are swung out on the davits ready for lowering at any time. As a rule these two boats opposite the engine room skylight are also swung out, and ready to lower at any time. These boats had been out that morning, but, in order to make the ship ready for going alongside the dock, they had been swung in, but were still in the tackle all ready. At the time, or just about the time, that the two ships came together, or a little before it, I gave orders to clear away the boats. The crew of these boats came there and lowered them down. The one on the starboard side, forward opposite the standard compass, was also lowered down, and these two boats were opposite the engine room skylight. The two small after boats were also cleared out, but never put in the water. Some two or three minutes before the "Chester" went down, this boat in charge of the second officer was under the "Oceanic" (pointing):

The Court—Q. You now refer to the forward boat?

A. Yes, sir; the boat just before the funnel, was in the water. I am not sure whether it was the boat before the funnel or the boat in wake of the mainstays but one or the other was in the water under the port bow. The corresponding boat opposite the funnel on the other side, and the one forward was down in the water, and alongside of the "City of Chester."

Mr. Barnes—Q. What facilities did you have in the

way of lowering these boats? What sort of falls or tackle to let them in the water?

A. Patent detachable falls. You lower the boat down so far, somewhere within a foot or two of the water, and then pull a lever, and the boat drops clear of everything.

Q. Is there any better method known for getting out rapidly and getting boats into the water than was employed on board the "Oceanic?"

A. Not seagoing ships.

Q. How many boats altogether were got out after the collision from your ship?

A. Five were in the water.

Q. How many people of the "Chester" were rescued by the men of your ship?

A. I do not remember exactly now, but I know in the third officer's boat there were about 32 people.

Q. Can you give us any idea how many came on board the "Oceanic" from the boats that were sent out, approximately?

A. Approximately, about fifty people.

Q. How many boats did the "Chester" have out?

A. She had one out.

Q. Was that boat, to your knowledge, lowered from the davits or did it float off when the ship went down?

A. Partly lowered by the davits, and floated as the ship was going down; floated sufficiently for them to unhook the tackle before she went down.

Q. That was the only boat she had out?

A. The only boat that was in the water by any help from the people on the "Chester."

Q. Do you know whether the boat so getting away from the "Chester" saved any lives?

A. Yes, sir; it had some people in the boat; I saw them going into the boat myself down by tackle falls. I believe they were transferred to one of the "Oceanic's" boats afterwards.

Q. Do you know what became of that solitary boat of the "Chester?"

A. I think that the Captain or one of the officers pulled in shore with it. I am not quite sure.

Q. Do you know of anything that was omitted to be done by those on board the "Oceanic," which, looking back at it now, you can see would have, under all the circumstances, prevented that collision?

A. I see nothing.

Q. Then, in summing up your testimony on this point, you had on the "Oceanic" just speed enough to subject her to the command of her helm when she was going at dead slow?

A. Yes, sir; just sufficient.

Q. That you had competent officers and lookouts stationed at proper positions on the ship?

A. At just exactly in the positions that are laid down by the owners.

Q. And that up to the time of the collision, you gave constantly the fog signals, within the limit of time prescribed by law?

A. Within the limit of time; yes, sir.

Q. How was it with reference to steam? You gave a signal that you would go to the left, though you were going slow and then dead slow. Did you have steam

enough on the "Oceanic" at that time to enable you to take her wherever you wanted to go ?

A. She was carrying the full legal pressure on the boilers all the time.

Q. Then her slowness of speed was not due because the steam was down ?

A. Not by any means.

Q. She had a full force of steam and was able to be handled with that in any way you desired ?

A. In any way we desired; a full force of steam.

Q. Had you known anything about the "City of Chester" before this day ?

A. Nothing,

Q. Ever been on board of her ?

A. Never.

Q. Did you know Captain Wallace ?

A. I never saw him before.

Q. Did you know anything about her or about her officers or crew or equipment, then you would know about any ship you met on the highways of the ocean ?

A. I had no knowledge of the ship whatever. I don't think I even knew there was such a ship in existence, to tell you the truth, at least on this side of the water. I know one on the other side of the Atlantic.

Q. Did it occur to you at all at the time you first signaled, or when you second signaled, that it was possible that a steamship could be sent to sea from dock at 9 o'clock in the morning that was not able to go out of this harbor without being flung about by the tide ?

A. Taking the general run of ships, they go out all right, so far as I know.

Q. Was there anything in your knowledge of navigation—I am asking you now on the theory that there is something in the proposition for which my friend is contending—that you were responsible for the tides and the steering way of the "City of Chester?" Was there anything that you knew about that ship or about the tides that would naturally call your attention to the circumstance that in encountering the young tide sweeping round Fort Point, she might be carried in a direction totally contrary to that in which she was attempting to be steered?

A. Nothing, whatever.

Q. Then, the proposition as to the tide and her ability to mind her helm, was not taken into consideration by you?

A. Naturally.

Q. Did you ever know a case where meeting a ship either at sea or in harbor you were obliged to calculate, in addition to what you were doing, the ability of the other ship to mind her helm, or be steered, and the intention of her Captain?

Mr. White—Objected to as irrelevant, incompetent, immaterial and not cross-examination.

The Court—I think that is so.

Mr. Barnes—I do not desire to take time in passing on this matter, but it is the very question that the counsel was insisting on putting to the Captain, as to what the condition of the tide was, what he knew about what the "City of Chester" might do and what the effect of the tide would be on her. He has asked all these questions. Now I ask him if he knows, or if he ever knew, of its being

taken into consideration anywhere in navigating ships, that the master of one ship calculated or guessed the ability of the other ship to steer in a tideway or out of it, or what the intention of the Captain was independent of his signals. Is not that proper.

The Court—I think the Court has got to infer from the testimony as to what was done.

Mr. Barnes—I submit to the ruling of the Court.

The Court—I shall sustain the objection.

Mr. Barnes—Q. You say at the time of the collision you were on the bridge. When did you go on the bridge that morning?

A. I would not be certain to the hour; somewhere obout 4 o'clock in the morning.

Q. Had you been on the bridge constantly on the lookout from 4 o'clock in the morning down to the time when this collision occurred?

A. Constantly on the bridge.

Q. At what hour did the pilot come aboard?

A. In the neighborhood of 8 o'clock in the morning.

Q. About what point did you pick him up?

A. Off the whistling buoy.

Q. From the time he came on board up to the time of the collision, where was he?

A. On the bridge.

Q. Did he leave the bridge at all from the time he first came on board and mounted it until this collision?

A. Never.

Q. How well do you know Louis Meyer, the pilot?

A. I have known him for a number of years.

Q. Do you know what his reptutation as a pilot is?

A. I think it is generally conceded the best.

Mr. White—I object to the question as not being cross-examination. I understand that Mr. Meyer holds a license as a pilot. The presumption is he was competent.

The Court—I think so.

Mr. Barnes—He has answered the question.

RE-DIRECT EXAMINATION.

Mr. White—Q. In placing these models to show the position of the two vessels when you first saw the "Chester," I will ask if you do not give the Court by your position of them a wrong idea of their position? As I understand you, the vessels were about half a mile apart when you first saw them?

A. Yes, sir.

Q. And the "Oceanic" was 480 feet long?

A. 438.

Q. Then the position of the two vessels was that the "Chester" was about six ship's lengths of the "Oceanic" distant from you?

A. About half a mile; that is six ship's lengths.

Q. Then, instead of their being in that position, the position would be more truly represented if we put the "Oceanic" about here (illustrating)?

A. You would have to extend it further back yet. The extension of the proportion would be as to the length of the "Oceanic" and the distance between the two ships. You cannot get the relative proportion, because in putting this ship further off, you have still to establish the two and a half points on the starboard bow. She is not two and a half points on the starboard bow.

The Court—Q. Put it over there by the water tank.

A. That is somewhere about the length (illustrating.)

Q. Come and look at it from this point.

A. Turn the bow to the left, Mr. Barnes.

Mr. Barnes—Be good enough to address me in the language of your craft. Shall I starboard the helm, sir.

A. Yes; starboard it, please. That is about it.

Mr. White—Q. You think, comparing the size of these two models, that that would be about the relative position and distance of the ships?

A. Yes; when the first signal was given to starboard.

Q. As I understood you all through, the direction did not change substantially at the time of the second signal, that is, so far as the number of points were concerned?

A. Not a great deal; no, sir.

Q. The positition was such at the time of the second signal as if the "Chester" had simply advanced along this line towards the "Oceanic"?

A. Yes, sir.

Q. How far back on the "Oceanic," on the starboard bow of the "Oceanic," were these marks of the collision?

A. 2 or 3 feet; I think they extended from the stem, 4 or 5 feet abaft the stem.

Q. About 4 or 5 feet from her stem, abaft the stem, along the starboard side?

A. Yes, sir.

Q. Were there any marks at all on her port side?

A. No marks whatever.

Q. As I understood you to say, this indicated to you that the "Chester" ran into the "Oceanic"?

A. Yes, sir.

Q. At what point did the "Chester" strike the "Oceanic"? what point on the "Chester"?

A. Somewhere about a little abaft the foremast.

Q. How many feet back of her stem on the port side?

A. Approximately, 30 or 40, about 40 feet, say.

Q. Now, applying the same rule as to the marks on the "Chester" that you applied as to the marks on the "Oceanic," did not the marks on the "Chester," the fact that the marks on the point of impingement on her were 30 feet back from her stem on her port side indicate to you that the "Oceanic" ran against the "Chester"?

A. No, sir; because I think if the "Oceanic" had struck the "Chester" she would have had marks on both sides.

Q. Taking the mark of the "Chester" alone, was it?

A. The "Chester" having momentum or way upon her, and running across the "Oceanic's" bow, directly the ships came in contact together, the plates and beam ends and stringer plates would make the piercing marks into the "Oceanic" plates that were made. The marks were pierced in.

Q. Suppose the "Chester" had not in fact gone down and her side had not burst open, but there had been some marks on her port side. Applying the same rule to those marks that you applied to the "Oceanic," what would your examination of the "Chester" have indicated as to which one ran against the other?

A. If the "Chester" had not sunk, my assumption is you would have found the "Chester's" plates bent in and pushed aft on the after part of the fracture. The fore

side would not have shown any trouble except the breaking of the plates.

Q. Your theory is that the "Chester" had considerable headway to the north ?

A. She must have had or she could not have got across the "Oceanic's" bow.

Q. At the very moment of the collision, as I understood you from placing the two models, occurred, the two ships were almost at right angles with each other ?

A. Nearly; not quite, though.

Q. The breaking into the "Chester" was caused by her momentum forward, and not by her momentum towards the "Oceanic"?

A. Her momentum forward and sideways. The ship, clearly to me now and always from the time of the collision, seemed to come in a motion not only in a headway, but sideways, as if she was actually acting on her port helm, as if her helm was hard aport. You can see the same motion on a yacht tacking in a wind and putting the helm down. It is a head motion and a side motion.

The Court—Q. Described sometimes by some people as the swinging of a sleigh ?

A. Just the same as the swinging of a sleigh going around the corner, exactly.

Mr. White—Q. Explain how it could be that the "Chester," having the tide tending to carry her to the right, and having her motion forward, and the two vessels striking at right angles, or practically so, how the "Chester" could have come down and struck the "Oceanic" on the left at the same time you were going backwards with the "Oceanic ?"

A. The engines were going back, but the "Oceanic" was simply stopped. She was not going back much. The motion was almost imperceptible. She was not stopped dead. When the "Chester" began to act on what I thought was her port helm. At the beginning of the tide and afterwards, she got into the same tide that the "Oceanic" was in; the influence of the tide was the same in both ships.

Q. The tide was not a factor at all, because it carried them equally?

A. After the "City of Chester" had crossed that tide rip that is claimed by the "City of Chester" to have caused her to act as if under a port helm, after she got across that and got into the other tide, she was under the same influence of tide as the "Oceanic" exactly.

Q. So that the tide would not throw the "Chester" against the "Oceanic" or the "Oceanic" against the "Chester?"

A. The tide would not throw the "Oceanic" against the "Chester" nor do I think the "Chester" against the "Oceanic." It is impossible. When two bodies are in the same tide, unless there is some other action on these two bodies, they will maintain their relative position in the tide, and both float along with it, as far as you like.

Q. Not considering any other forces in operation on the two vessels, they would have floated in so far as the tide was concerned; the "Chester" floated in sideways and the "Oceanic" coming with her stem towards her; is that right?

A. Without considering any other influence, wind or engines, or anything.

Q. There was no other force in operation on the "Oceanic," as I understood you?

A. No other force when?

Q. On the "Oceanic" at the time of the collision?

A. I do not understand your question.

Q. At the time of the collision there were no other forces operating on the "Oceanic" except the tide?

A. Yes; the engines were acting full speed astern.

Q. She was then overcoming the tide?

A. No; not at all. She was simply overcoming her progress through the water.

Q. As I understood your examination Thursday, that part of it in narrative form, you said you had seen the water come forward from the propeller of the "Oceanic" in such a way that you saw she had overcome her momentum forward?

A. She had overcome her momentum forward.

Q. Omitting the tide as an influence on her, there was nothing left at all in the whole matter but whatever momentum the "Chester" had. Is that correct?

A. That is, in my opinion, correct.

Q. And the tide at the time of the collision, although it might have brought the vessels up into that position, still, as they were then in the same tide which was the flood tide running in through the middle of the channel, would not influence the matter at all, one way or the other?

A. That is right.

Q. Then the collision must have occurred entirely, as you understand it, by reason of some momentum had by the "Chester"?

A. The momentum that she had due to deviation from

the apparent course that she intended to take. It was not the momentum alone.

Q. Explain to the Court what you mean by that factor, the deviation from the apparent course she intended to take?

A. She intended to pass us on the starboard side. The signals were given to that effect and answered by the Captain of the "Chester." The whole course of the navigation of the two ships depended on that. If the "Chester" had starboarded his helm and altered his course one point to the left, he would have cleared the "Oceanic" absolutely. There could have been no collision.

The Court—Q. That is at the time of the first signal?

A. That is at the time of the first signal.

Q. At the time of the second signal you did not indicate how much change the "Chester" would have had to have made in its course in order to avoid the collision?

A. A point or two points; not more.

Q. Not more than two points after the second signal?

A. If it had been absolutely complied with at once.

Q. It would have prevented the collision?

A. It would have prevented the collision.

Mr. White—Q. When you throw the helm of a vessel hard astarboard, how many points will that change her course?

A. It depends on the speed of the ship, and how far you want her to go, if you put the helm hard astarboard and go full speed ahead.

Q. It depends on the size of the ship?

A. Not at all.

Q. How many knots an hour would be dead slow on the "Oceanic"?

A. About four knots.

Q. What is full speed?

A. Fourteen.

Q. I presume it would require a great deal more water in which to turn the "Oceanic" completely around, if she was going dead slow, than if she was going at full speed?

A. No, sir; I think probably she would turn in less space going dead slow.

The Court—Q. But longer time?

A. But longer time, but I have never tried it. It is never tried in anything except men of war.

Mr. White—Q. A longer time, but no greater diameter?

A. I think not; speaking now generally.

Q. You think in still water you probably could turn the "Oceanic" in a mile across the water, either at dead slow or full speed?

A. Yes, sir; it would probably take longer rather at full speed, on account of the speed of the ship, than it would when she is going slow.

The Court—Then a vessel obeys its helm quite as well, if not better, when going dead slow than if going fast?

A. No, sir; she is slower in her motion.

Q. So far as distance is concerned?

A. Speaking generally, I think a ship going dead slow with her helm hard astarboard would complete the circle in as small a distance as a ship going full speed, but would take longer over it.

Mr. White—Q. How far off were you from the north shore when you sighted the "Chester?"

A. About a quarter of a mile, I should say, from Lime Point.

Q. How far were you from the "Chester?"

A. About half a mile.

Q. In steering a vessel, in attempting to turn her, and not backing at all, can you turn her any faster than simply to put her helm hard aport or hard astarboard?

A. You can turn a ship in a small distance by backing, but she will only turn one way.

Q. If you do not back at all, the shortest space in which you can turn her is to take whatever water is required by putting the vessel hard astarboard or hard aport, depending on which way you want it to turn?

Q. Whichever way we want to turn her for safety, you take the biggest water you have got; whichever side you have got the biggest water.

Q. I am not asking which side you propose to turn. I am asking you whether putting the helm hard astarboard or hard aport turns you as fast as you can turn her that way?

A. Oh, yes; going ahead all the time.

Q. If you wanted to make a very large turn—swing around a two-mile circle—you might put your helm half astarboard?

A. Yes.

Q. If you wanted to turn in the shortest space possible, and still going ahead, the most you could do is to put your helm hard astarboard?

A. Yes, sir.

Q. You think you can turn the "Oceanic" in a mile of water when she is hard astarboard?

A. Without having any actual experiments on the thing, I believe she could turn in a mile. I am not prepared to state conclusively what distance she would take.

Q. I want you to state why, when you were a quarter of a mile from the north shore, and half a mile away from the "Chester," and turned your helm hard astarboard, that you avoided running into the north shore?

A. How we avoided running into the north shore?

Q. Yes?

A. Because there was never any idea of running into the north shore. We could see it.

Q. From the time you sighted the "Chester" she was a half a mile from you, you kept your helm hard a starboard?

A. Yes, sir.

Q. And ran that half a mile, and you were a quarter of a mile from the north shore, I want to know how you avoided running into the north shore?

The Court—Q. With your helm hard a starboard?

A. The ship was going at very slow speed, and, naturally, she took a long time to move. She did move to the left, but how much I cannot say—not sufficient to endanger the ship going on to the shore.

Mr. White—Q. Is that a factor in it—the fact of her going dead slow?

A. She would take very much longer to do it, that is all.

Q. But not any more water?

A. I don't know that she would. It is only an as-

sumption on my part. As I have told you, we never experimented.

Q. You know something about it. You have navigated that ship for a dozen years.

A. Yes, sir.

Q. Have you any further explanation to make of why it was you did not run into the north shore?

A. The only explanation is, we did not and never would while I was on board the ship. I can see the north shore.

DAVID FRANKLIN COOKSON. Called for the plaintiffs. Sworn.

Mr. White—What is your calling?

A. I am an engineer.

Q. Were you the engineer on the "City of Chester" at the time of her collison with the "Oceanic," on August 22d, 1888?

A. I was.

Q. You were the Chief engineer, were you?

A. Yes, sir.

Q. Where were you at the time the vessel collided?

A. In the engine room.

Q. I will ask you what apparatus, if any, the "Chester" had for signaling to the engineer from the bridge, from the pilot house?

A. I had a telegraph from the bridge.

Mr. Barnes—I understand that we are not going to try the "Chester" or anything that she did.

Mr. White—I will do what I can to show that the "Chester" is free from blame.

Mr. Barnes—That cuts no figure.

The Court—Suppose she was entirely free from blame?

Mr. White—If I can show she was entirely free from blame, there is not any question about the result of this case, if your Honor makes that finding that she was entirely free from blame; because, as I said before, this is one of those cases in which both vessels cannot be free from blame. It cannot be contended successfully by the other side that the science of navigation is so crude an art at this late day in the world, that two vessels in clear water and not a clear day, will collide in a harbor like that of San Francisco.

The Court—Go on, if that is your theory.

Mr. Barnes—Then I desire to take an exception to the testimony as to what was done on board the "City of Chester," or her connection with it; because whether she was to blame or not cuts no figure in this case, and the negligence, if any, is not imputed to these plaintiffs, and the want of negligence, if there is any such want, does not help them so far as we are concerned. The case is wholly directed to whether the "Oceanic" was properly governed and controlled at that time; and I repeat, because I would like to have your Honor's ruling upon that direct proposition, that assuming he can show that the testimony tends to prove that there was negligence on the part of the "Chester," that is totally immaterial because the negligence of the "Chester" is not to be imputed to the "Oceanic," nor on the other hand can the defendants impute to the plaintiff the negligence of the "Chester" in order to escape liability. In either aspect of this case, the "Chester being out of this controversy entirely, it must stand on precisely

the same footing that any other case of injury does stand, to wit, that there was an injury, and that it was caused by some act, neglect or default of this plaintiff, and the argument of counsel that it is impossible that an accident should have happened without anyone being to blame is of no sort of significance, and if we were to wash the "City of Chester" as white as snow that fact would not of itself have a tendency to establish fault or negligence. It is a fact to be proven on the part of the "Oceanic."

The Court—That is just the point, because all the other things disappear. The only other question is, if the "Chester" was absolutely without any fault, does that fact tend to prove the fault of the "Oceanic"?

Mr. Barnes—No; that is the very proposition, and that is so plain and self-evident when you have got to remember that negligence is a fact to be proven, and not an inference to be drawn. To say that the "City of Chester" was without fault does not prove as a fact that the "Oceanic" did anything wrong at all. There are established laws which we must comply with. There are laws of Congress and laws of prudence and laws of common sense. The "City of Chester" is out of it, I say, because if she was free from blame that does not prove anything, because if she was guilty of a fault the defendants cannot impute it to these plaintiffs, if she was as black as ink, nor can the absence of it help the plaintiffs, so far as we are concerned, if she was as white as snow. I do not see how, in the present attitude of the case, the "City of Chester" not being a party to this action, the owners of the "Chester" not being here soon, the whole case depending on whether the "Oceanic" did something it ought not to do which approxi-

mately contributed to this disaster, that counsel can proceed in this way. The inquiry must stop there.

The Court—The point is a very interesting one; I think perhaps it is a little different from the other question raised this morning, but I will admit this testimony subject to the same conditions. The objection will be overruled.

Mr. Barnes—I will submit to your Honor's ruling.

Mr. White—Read the question, Mr. Reporter.

(The reporter reads the previous question.)

A. I had a telegraph from the bridge.

Mr. White—Q. Was the telegraphic apparatus made use of for signalling from the bridge to the engine-room and back to the bridge, substantially like this one?

A. A similar design.

Q. How long were you engineer of the "Chester"?

A. From seven to nine years.

Q. Was this telegraphic apparatus effective and a good one?

A. Yes, sir.

Q. Go on and tell what you know in your own way about this collision that occurred on the morning of August 22nd, 1888?

A. The ship left Broadway wharf somewhere about 9 o'clock. The ship was put on her course and engines run full speed ahead. After that I left the engine-room to go to my own room to get coffee. I went into my own room for a moment, I believe, and from there I went to the starboard side of the ship to look over at Lombard street wharf. I then returned to my room to finish my coffee, but did not go in the room. I went into the engine-room down on the working platform. After I was there a short

time, we received the bells, to the best of my recollection we received a bell to go full speed astern The position of the indicator ahead, I don't recollect. We worked the engines full speed astern, and afterwards received the shock of the collision. After the shock we received a bell to stop, which was the last bell that I received, which the assistant engineer received rather.

Q. How long a space intervened from the time you sent her full speed astern before you received the shock?

A. Really, Mr. White, I could not say. I have no idea at the present time how long a time it was. It was, however, not a very long time; a very short space of time.

Q. You do not know what the indicator showed at the ttme that you got the order "full speed astern"?

A. I do not know; I do not recollect.

Q. You had been out of the engine-room?

A. I had been out of the engine-room.

Q. After you got the order to stop what did you do?

A. I ordered the assistant engineer on watch to go below, and take a look round the fire-room. I ordered the pumps to be started and the soundings to be taken. I stood by the engines myself waiting further orders by telegraph. In the meantime, not getting any orders, I stepped up on the upper platform and looked out of the engine-room door. I found that the water was well-advanced on the main deck aft; that is, it was as far as the mess-room I stepped into the engine room and called for all hands to come up and save themselves. I then passed through the saloon up on to the hurricane deck on the starboard side. I saw nothing there as it was foggy. I passed through between the forward house and the after

saloon to the port side, and loosened my shoes and stepped overboard; I swam to the small boat and was pulled in.

Q. You jumped overboard before the "Chester" went down, then?

A. Yes, sir.

Q. I will ask you, taking this model, about where you were; at what point you jumped overboard? Indicate it on the model?

A. I jumped overboard here (pointing).

By Mr. Barnes—Q. On the port side, just aft the funnel?

A. On the port side aft the funnel.

Mr. White—Q. A little back of the funnel or by the funnel?

A. Back of the funnel; abaft the funnel.

Q. At the time that you were there, did you see the "Oceanic?"

A. I don't recollect seeing the "Oceanic" until after I got in the small boat.

Q. What small boat was that?

A. A small boat belonging to the "Oceanic."

Q. Do you know whether any boats of the "Chester" were got out?

A. I do not, of my own knowledge, know of any boats of the "Chester." I was down below. When I got out it was time for me to get out, and I got out as fast as I could.

Q. You stayed down with the engines until you only had time enough to save yourself?

A. I stayed down with the engines until the ship was

probably in that position; the water was at the mess-room door on the main deck.

Q. That is, her bow was away down in the water?

A. Her bow was down in the water.

Q. How was the "Chester" manned? What kind of a crew did she have?

A. We had, I believe, 12 or 13 men in the engine-room. I don't know how many were on deck or in the steward's department.

Q. How were your men; were they competent men or otherwise?

A. All competent men.

Q. Of what nationality?

A. The engineers were American citizens. The firemen, I believe, with one exception, were Irish, belonging to Ireland; the only exception was, I believe, we had a Swede or a Norwegian, something of that kind; I don't know exactly what nationality he was.

Q. Do you know where the collision occurred?

A. No, sir; I do not.

Q. What kind of weather was it?

A. When we left the dock it was clear; in passing Lombard street wharf I saw Lombard street distinctly, and I do not know what the weather was after that, until I came up from the engine-room, when it was foggy.

Mr. Barnes—Q. That is after the collision?

A. After the collision.

Mr. White—Q. How foggy was it?

A. I do not know I can tell you how foggy it was. I could not see anything when I came up from the starboard side. There was nothing to be seen from the engine-room

door. The engine-room door is on the starboard side. When I passed over on the hurricane deck and over to the port side I saw the small boats and various debris.

Q. You mean to be understood that the weather was clearer on the port side than on the starboard side?

A. I do not mean to say that, but those objects were there to judge by. On the other side there was no objects to be seen, so I could not judge how thick the fog was. It was simply a haze of fog; I could not see anything.

Q. Do you remember whether you could see any distance of clear water on the starboard side?

A. I don't recollect. I don't think I saw any clear water.

Q. You think it was foggy all round; that is, on that side?

A. Yes, sir.

Q. Do you know of any fault committed in the engine room, or in the giving or obeying of orders, that in any way contributed to that collision?

A. None, whatever.

CROSS-EXAMINATION.

Mr. Barnes—Q. What was the tonnage of the "Chester?"

A. I believe the net tonnage was something over 700; the gross tonnage something between 1100 and 1200 tons.

Q. Do you know what her length was?

A. Her length was somewhere in the neighborhood of 210 or 220 feet.

Q. What draught of water?

A. We drew from nine to thirteen feet, I believe.

Q. What was the steering-gear? Did she steer by hand, with a wheel?

A. By hand.

Q. With the ordinary wheel?

A. Yes, sir.

Q. What wharf did she depart from?

A. I think Broadway, No. 2.

Q. Who was in charge of the engines that morning?

A. The second engineer; I believe his name is Rufus.

Q. How many engineers were there on the "Chester?"

A. One chief and two assistants.

Q. You were the chief?

A. Yes, sir.

Q. The first assistant was who?

A. William Bowen.

Q. And the second assistant?

A. Rufus Comstock.

Q. Where were you stationed, and your duty on that steamship when she left Broadway wharf No. 2?

A. In the engine room.

Q. To do what?

A. To see that the engines were properly worked.

Q. And you were there for that purpose?

A. Yes, sir.

Q. And you did so?

A. Yes, sir.

Q. And they were worked all right?

A. Yes, sir.

Q. Where was the station of the first assistant engineer?

A. The first assistant engineer was not on watch. The rules and regulations of that company do not call for the first assistant to be in the engine room unless he is on watch.

Q. He was not on watch, and not in the engine room?

A. No, sir.

Q. Where was he?

A. I don't know. I presume he was abed.

Q. Abed?

A. Yes, sir.

Q. The second assistant was actively busy about the engine room looking after things?

A. Yes, sir.

Q. Whereabouts is the engine room that you were stationed in?

A. I do not know that I understand your question, Mr. Barnes.

Q. What part of the ship, I mean?

A. Somewhere about here (pointing).

The Court—Abaft of the funnel?

A. Abaft of the funnel.

Mr. Barnes—Q. And below the deck, of course.

A. Below the deck, yes.

Q. So that when you were in the engine room you had no information of what was going on, except such as you got through the telegraph?

A. No, sir.

Q. What was your only means of communicating with whoever was on the bridge and in command of the ship?

A. We had a speaking-tube.

Q. You had a speaking-tube besides?

A. We had a speaking-tube besides.

Q. Was that generally availed of? Or was it the telegraph you used?

A. We used them both.

Q. Under what circumstances were they used as one distinguished from the other; the ordinary signals to work the engines came by telegraph?

A. Yes, sir.

Q. What was the speaking-tube used for—to ask you why you did not hurry up, or anything like that?

A. Various different orders that the Captain chose to pass down to the engineers were received through the speaking-tube.

Q. When you were in the engine room you had to keep yourself alive, not only to see what the telegraph dial said, but what might come down the tube?

A. Both instruments gave an alarm.

Q. That is what I wanted to get at. Whereabouts did you get the order to go ahead full speed?

A. I presume after he had straightened the ship round on her course, just off Broadway No. 2.

Q. Shortly after getting free from the dock?

A. Yes, sir.

Q. By the way, when you got the order to go full speed ahead, what did you do?

A. Put her on full speed ahead.

Q. You got the order off Broadway No. 1 or No. 2 to go full speed ahead?

A. Yes, sir.

Q. What was the next order that you got that you remember?

A. The next order that I got personally was full speed astern, but I was out of the engine room in the meantime.

Q. The next order you got was full speed astern?

A. Yes, sir.

Q. Did you go full speed astern?

A. Yes, sir. I would state, Mr. Barnes, that the assistant engineer is in charge of the engines. The chief engineer is supposed to be in and about the engine room at the making of wharves or landings. I was not in the engine room at this time; I left the engine room and returned again.

Q. I am simply asking about your knowledge. Anything that transpired when you were not in the engine room you are not supposed to know. When the order came down to go full speed astern, did that come by the telegraph or come by the tube?

A. It came by telegraph.

Q. Did you immediately comply?

A. It was immediately answered.

Q. By whom?

A. By myself and the assistant engineer.

Q. Did you take the time of day any time about the time of the collision?

A. At the time I felt the shock I looked at the engine room clock, and to the best of my ability it was twelve minutes to ten.

Q. Twelve minutes to ten when the shock occurred?

A. When the shock occurred.

Q. What time did the "Chester" go down?

A. I do not know.

Q. About how many minutes after the shock when you say it was 9:52?

A. It is our place to keep a record of all that transpires in the engine room, and as soon as I felt the shock I glanced at the clock, which was immediately.

Q. I only want to get your general impression. How long after that was she afloat, do you think, five or six minutes?

A. I do not think she was afloat more than four or five minutes.

Q. When you went to call those down below to come and save themselves, was there anyone below?

A. One man.

Q. Do you remember who he was?

A. The second assistant engineer.

Q. And his name?

A. Rufus Comstock.

Q. Did he come up?

A. He came up, yes, sir.

Q. Did he go over the side of the ship with you?

A. No, sir; he went over the side of the ship, but not until after I was in the water.

Q. Did he follow you over? Did you see him?

A. I saw him in a small boat. I did not see him go over.

Q. Was he rescued by the same boat that pulled you in?

A. He was rescued by another boat. Afterwards he got out of that boat and came to the boat in which I was in.

Q. Was the boat that rescued him a boat of the "Oceanic" also?

A. I do not know.

An adjournment was here taken until two o'clock p. m.

AFTERNOON SESSION.

D. F. Cookson. Recalled.

Mr. White—Q. You spoke of a record being made down in the engine-room of whatever order you received and obeyed. That record, I presume, went to the bottom along with the ship?

A. We had no time to make a record, we noted it mentally, and make at our leisure. There was no record made.

Q. The record of the of the other movements of the ship went down with it?

A. Yes, sir.

Q. You say you do not remember whether any order was received to go dead slow, or at half speed, between the time you started at full speed and the time you got the order to go full speed astern?

A. Not of my own knowledge; I do not recollect it.

Q. At the time you came on deck, just before the ship went down, could you see any of the points of the land in that vicinity?

Mr. Barnes—Counsel examined this witness and got through with him. I did not say much about it in the case of the Captain, but let him go on with it, but why should he reopen this case again. I only asked the witness a single question, now counsel is going on again over the whole case. He did the same with Captain Metcalfe,

and the same thing with the pilot. Inasmuch as they were the principal officers of our ship, I made no objection, but I do object to the whole matter being reopened.

The Court—General Barnes objects on the ground that you have exhausted this witness, Mr. White.

Mr. White—I guess on this question it is so. That is all.

CHARLES MCCULLOM. Called for the plaintiff, testified as follows:

By Mr. White—Q. What is your name?

A. Charles McCullom.

Q. What is your calling? What do you do for a living?

A. I am first officer of the "Pomona," now, sir.

By Mr. Barnes—Q. Of the "Pomona?"

A. Yes, sir.

By Mr. White—Q. What position, if any, did you hold on the 22d of August, 1888?

A. I was first officer of the Chester.

Q. Were you on the Chester at the time of the collision between her and the Oceanic?

A. Yes, sir.

Q. Go on and state, Mr. McCullom, all that you saw and noticed and did about that collision.

A. Well, we left Broadway wharf about 9 o'clock; it was about ten minutes or about a quarter to nine, or something like that. We left the dock and it was clear until we come down to the Presidio, somewhere around there, and I went down below for to see that everything was all right, because when we get outside the ship rolls, if any-

thing has gone wrong, and I am to blame; so I was down there fixing things, and heard these steamers blowing the whistles.

Q. What whistles did you hear?

A. They were blowing the fog whistles. I didn't notice that particularly, because I had no position on deck; I was below. Then I heard two whistles blow, and then two again, and then I came up on deck; the Oceanic was about—she wasn't more than 50 feet away from us; about 50 feet; and I sang out for the people—says I: "Get back out of the way!" and I stood close alongside the pilot-house, right alongside the pilot-house, and then, when she struck us, I sang out for the people to come and get aboard of her.

Q. On board of the "Oceanic?"

A. Yes; they were both level together, and you could step right on board of her.

Q. On board of the Oceanic?

A. Yes, sir.

Q. Taking these two dummies here, show us about what the position of the two vessels was.

A. There is where she struck us (showing), right here, about twenty feet from the bow, and went right about ten feet into us.

Q. About twenty feet from the bow?

A. Twenty feet, sir; there is where she struck us, right here.

Q. Twenty feet back from the bow of the Chester?

A. Yes; that is where she struck us, right there (showing).

Q. At about what angle did the ship strike you?

A. About that (illustrating). I saw her coming, and as I saw her coming I sang out to the people to get back. I knew she was going to hit us, and she took us right here (showing).

Q. How far did the Oceanic get into the Chester?

A. About ten feet.

By the Court—Q. I thought you said twenty feet?

A. No, sir; ten feet she went into us. She got ten feet into us when she struck us. Ten feet right here (showing).

Mr. Cobb—He said she struck her twenty feet from the bow.

By Mr. White—Q. Where did you stand?

A. I stood right at the pilot house.

Q. And when you came down, did you?

A. No, I wasn't up on top at all. I was on this deck (showing). There is another deck up above. I was down alongside the pilot house on this deck here (showing).

By the Court—On the upper deck?

A. No, not on the upper deck; there is three decks to that ship.

By Mr. White—Q. And you stood there and helped the people to get across on the Oceanic?

A. Yes; we passed them up as long as they would go, you know; some would not go along; they went in and got their baggage, and we passed them along up until we couldn't reach any more, and then we had to help ourselves.

Q. From the position in which you stood you could see very plainly how far the Oceanic had got into the Chester.

A. She was about ten feet into us.

Q. About half way through?

A. About half way; yes, sir.

Q. State whether or not you felt the shock when the two vessels struck together?

A. No; I didn't feel no shock. She went right through just like cutting cheese.

Q. Do you know where the vessels were?

The Witness—At the time this collision occurred?

Mr. White—Yes, sir.

A. Pretty close to Fort Point.

Q. How far off from Fort Point were they?

A. I don't know; they were pretty close. I could not say how far, but they were close to Fort Point.

Q. You have been in and out through this channel very many times?

A. Well, a few times; yes, sir.

Q. What were the relative distances of these vessels as relating to Lime Point and Fort Point. Which one were they nearest to?

A. Nearest to Fort Point.

Q. How do you know?

A. Well, I know that they were both, I guess both of them was pretty close to Fort Point, closer than to Lime Point.

By the Court—Q. You say they were closer to Fort Point than to Lime Point?

A. Yes, sir.

Q. Well, how do you know that?

A. I know it, because it was clear enough for us to tell when we went down the bay, and we went down about t]

Presidio, and I was down below when I heard the whistles blow, and we went against a strong flood tide.

Q. When you came up on deck did you see the shore on either side?

A. No, sir, I did not.

Q. How many times have you been in and out through this channel—through this harbor?

A. I don't know how many times; I could not tell you that.

Q. How long have you been engaged in the seafaring business here near San Francisco?

A. About twenty years.

(No cross-examination.)

CAPTAIN THOMAS WALLACE, called for plaintiffs, testified as follows:

Mr. White—Before examining Captain Wallace, I desire to call your Honor's attention so that it won't mislead you, to the fact that this map here is not at all correct in regard to the positions of Lime Point, Point Diablo and Point Bonita, as compared with the scale that is made use of from Fort Point and Lime Point, Point Bonita is, in fact, as your Honor will easily notice by looking at that other map, about three-quarters of a mile further to the west than it is indicated on this map. (Referring to the sketch on the blackboard.)

Mr. Barnes—That was intended to be nothing more than a rough sketch, so that the witnesses could refer to it. But your Honor has the correct coast survey map before you all the time.

The Court—It is intended to be a sketch only.

Mr. Barnes—It is nothing but a rough sketch, and the correct and regular survey map is before your Honor.

Mr. White—That map is undoubtedly correct.

Mr. Barnes—We had to foreshorten the thing a little bit, in order to get the point on the blackboard at all.

By Mr. White—Q. Your name is Thomas Wallace, isn't it?

A. Yes, sir.

Q. What is your profession?

A. Master mariner.

Q. How long have you been a seaman?

A. Thirty-two years.

Q. How long have you been a commander of a vessel?

A. Up to the present time.

Q. Since the first time?

A. Twenty-two years, or twenty-one years and eight months; about that.

Q. You were the Captain who was in command of the steamship City of Chester on the 22nd of August, 1888?

A. Yes, sir.

Q. What were the dimensions of the Chester?

A. Well, about 205 feet long, and about 32 feet beam, and she was 16 feet in depth.

Q. Sixteen feet in depth?

A. Yes, about 16, I think.

Q. What was her tonnage?

A. About eleven hundred—about eleven or twelve hundred gross, and eight hundred and sixty odd tons net, I think it was. These are not the exact figures, but it is somewhere near that.

Q. Go on and state, Captain, from the time you left

Broadway wharf on that morning, up to the time of the sinking of your vessel, what occurred.

A. Well, we left Broadway wharf that morning shortly after nine o'clock, and took her out, the tide being flood tide astern; turned about, and we hooked her on, as soon as we got her stern down—hooked her on full speed and went down the bay. It was clear weather until we got down to Presidio shoal buoy, and it was still clear in shore to the southward of us, but thick outside of us; but we were running on the edge of the fog, and we started the fog whistle blowing—that is, we blowed once a minute—and we run into the fog before we got down about half way between the Presidio shoal buoy and the Fort, we ran into the fog.

By the Court—Q. Was the Presidio shoal buoy to your right or left ?

A. About 150 feet to the right.

By Mr. White—Q. Then you were inside of it ?

A. Yes, sir.

Q. Inside the shoal ?

A. Yes, sir. We steered the usual course going down to clear the fort, and down a little ways, off Presidio, down a little ways, we ran into the fog quite thick. Still, I could see the land in shore of us going down, and abreast of old Presidio wharf I could still see some piles on it; then it got down very thick, and just at that time I heard a steamer outside of us. She seemed to be right ahead, about in that direction (showing), and she blowed two whistles, and I answered them with two. I will state that before that we had slowed the ship down, before we ran into where it was very thick, and proceeded on ; and a little further down I heard this ship blow two more whistles; I answered

them with two whistles, and I put my helm hard to starboard. I put my helm first thing hard to starboard ; the first time; when I heard the first whistle. I hadn't seen anything of the ship then ; so far as the time, I didn't know the exact time, it was certainly less than a minute, about that time. I seen the spar buoy of Fort Point, off Fort Point about 100 to 150 feet off our port bow, and at the same time a ship loomed up about two points on our port bow, and I immediately saw that it was an utter impossibility, with the helm hard astarboard, to clear the "Oceanic." I rang the indicator full speed astern and let the flood tide take her bow, her stern being still in the eddy, and let her swing right around, and in less than two minutes she crashed into us and cut us more than half way in two, and I directed everybody as soon as I saw it, I directed the officers when I heard the waters rush in, I directed the officers of the ship that were forward, to pass everybody that they possibly could on to the "Oceanic" before there was any danger of our sinking; but before we got them all passed on she sank. Seeing that there was no chance to do anything else with it, I left the bridge ; she sank right there, and we got one boat out, and some men got another boat about out; one boat had all the passengers in her that she would hold, and the other was just being got ready when the ship went down, and I was on the bridge and I looked around and I could not see anybody else on the boat, and I left the bridge and went aft, and just as the ship was going down I jumped overboard off the stern.

Q. Tried to get as far away from it, I suppose, as possible.

A. Yes, sir.

Q. Now, as I understand you to say, just a minute or two before the collision occurred you saw Fort Point buoy about 100 feet away from you?

A. In the neighborhood of 100 feet; not over that.

Q. Where was the Oceanic; what direction was she at that time?

A. She was in our port bow.

Q. How many points off your port bow was she?

A. A point and a half or two points off our port bow.

Q. Had you seen her at all before that?

A. No, sir; that was the first I seen of her.

Q. Where were you up to the time of the collision; on what place on your vessel?

A. I was on the bridge.

Q. What kind of a lookout was being kept on your vessel?

A. We had a first-class lookout.

Q. Well, what was it?

A. I had the second mate forward on the topgallant forecastle, with a man with him; I had another man on the bridge blowing a whistle, and I stood on the bridge with him; I guess that is all the men that were on the lookout. Then there were two quartermasters in the pilot house, one of them looking out of the window.

Q. Was any attempt made upon your part to see the Oceanic before you say you did see her?

A. Yes, we were looking for her.

Q. What was the reason you didn't see her sooner than that?

A. Well, It was so foggy we couldn't see her.

Q. Where was the fog from you, was it all around you, or was it laying in some particular direction?

A. No, sir; it wasn't exactly all around us until we got almost abreast of the Fort. It was perfectly clear to the southward of us—perfectly clear—and we were running right on the edge of it. It stood like a wall; it started from Fort Point and took in Alcatraz Island; it was as straight as a wall.

Q. How far off from the south shore did this collision occur?

The Witness—From Fort Point, do you mean?

Q. Yes; from Fort Point; from the south shore.

A. Well, there is 150 feet off the buoy. Probably about from 600 to 650 off Fort Point.

Q. In what direction?

A. North—nearly north.

Q. Had you or hadn't you passed the buoy?

A. No, sir; we hadn't passed the buoy.

Mr. Barnes—Will you take this chart—assuming that map to be approximately correct—(referring to diagram on blackboard) will you make a chalk mark where you say you were?

Mr. White—This is supposed to be seven and one-eighth of a mile from there across to there (pointing).

A. It was about in that position, sir (marking with cross), that is, supposing the scale to be correct, right in that position.

The Court—Now mark your course going out.

A. Here is Presidio shoal buoy; I passed inside of it, inside in that direction (showing), and were just barely near the buoy here when this vessel—when we were hard

to starboard—when we met the ship here heading west southwest, and we had this buoy 150 feet on our port bow, the ship headed west south-west, and seeing the other ship coming in, her bow in that direction (showing), there was nothing, not a tow-boat nor anything else could have cleared it; and all I could do was to keep our bow in the tide and turn her back full speed and let her drift around, which we did.

By Mr. White—Q. Was there any influence on either of those ships by the tide that had anything to do with that collision so far as you know?

A. I don't understand the question, Mr. White.

(Reporter repeats the last question.)

Q. (Continuing) That is, I will ask you whether or not the tide—the flood tide—as it comes in here and strikes this shore just outside of Fort Point (showing) is then turned strongly across towards Lime Point?

A. Yes, the tide floods that way.

Q. Well, now I want to know whether or not the vessel, or either of them, were caught in that tide and deflected any?

A. Yes; as soon as we saw, the moment we met the "Oceanic." our bow was just getting into the tide, and if I had gone ahead and I would have struck the "Oceanic" amidships and perhaps I would have sunk her, and the only thing to avoid that collision was to go astern full speed; while the stern was still in the slack water—at least tolerably slack water—her bow was in the tide. She ran six knots an hour, and let her bow swing around.

Q. Your helm was hard astarboard?

A. Yes, sir.

Q. And the effect of full speed astern was, then, to throw her bow to port (to starboard)?

A. Throw her bow to port (to starboard).

Q. How long was it before the collision occurred that you gave the order: "Full speed astern?"

A. Not over two minutes.

Q. State whether or not that order was obeyed?

A. Yes, sir.

Q. How do you know?

A. Because the ship commenced to tremble and was immediately shaking all over.

Q. How much headway did your vessel have at the time the vessels collided?

A. My ship had sternway.

Q. How do know that?

A. I know, because I know that within two minutes, when the ship was going ahead full speed, that the ship can be brought to a standstill, and she had been running nearly two minutes at full speed astern when the collision occurred, and she wasn't running nearly full speed before, but about in the neighborhood of half speed before that. That is all I have to judge by.

Q. How fast was the Oceanic going?

A. I have no means of judging that, sir.

Q. What were the equipments and apparatus of the Chester. State whether or not they were proper and sufficient?

A. Yes; we had had it examined by the United States Inspectors, and everything was first-class. Everything that was on the ship was approved by them.

Q. How about your steering apparatus?

A. It was good; as good as could be, without we had steam gearing; but then she was such a small vessel it didn't necessitate any steam gearing.

Q. She was provided with a telegraphic apparatus to signal to the engineer?

A. Yes; they call it a telegraph, but it is not exactly a telegraph. The dials are almost the same as those, but in place of their being worked by electricity, it was a system of wires that wound around and worked the hands, the same as the telegraph itself.

Q. Well, how does that work compared with the telegraph?

A. Identically the same.

Mr. Barnes—It is just the same, Mr. White, except one is moved by an electrical current and the other by the actual motion of the wire; that is all the difference.

The Witness—That is all the difference.

Q One, wire moves, and the other, eletricity moves?

A. Yes, sir.

Q. How were you provided with boats and with life-preservers?

A. We had all that the law required.

Q. Well, in what order were they?

A. First class order, sir.

Q. What kind of a crew did you have?

A. Good crew.

Q. Chinamen or white men?

A. White men.

Q. What number of crew did you have?

A. I think we had—well, it used to vary a little. Once in a while from thirty-six to thirty-eight men;

I am not positive how many we had that particular trip.

Q. Did you have a sufficient number?

A. Yes; the law called for thirty-two, and we carried always more than that; more than the law required.

By the Court—Q. How many in the forecastle?

A. Twelve.

By Mr. White—Q. Was there anything in either the manning or the equipments of the Chester that was lacking when she went out that morning?

A. Nothing, sir, that I know of.

Q. In what order was her machinery?

A. First, class, as far as I know.

Q. And when you first saw the Oceanic, in what direction was she heading?

A. I was heading west southwest; she must have been heading about northeast, northeast by north; I am not positive about that.

Q. And you say she was about two points from you?

A. On our port bow, one and a half to two points

Q. Was there any time from the time that you were able to see her through the fog, that she appeared to be dead ahead of you?

A. No, sir.

Q. At what angle were the ships when they collided? Show to the Judge by using these models.

A. On that angle (showing); right square across.

The Court—Q. Supposing this larger vessel is now coming in through the gate; now, then, locate just where they were.

A. When we first saw her?

Q. Yes.

A. In that direction (showing).

Q. Did you see any time when your smokestack and foremast would be in line with this part of the Oceanic?

A. No, sir.

By Mr. White—Q. At the time that you could hear the whistle over in that direction (showing), you could not see her, but I understand you could see the south shore?

A. Yes, sir.

Q. Well, she was over in the fog, was she?

A. She was in the fog; yes, sir.

Q. And you were outside?

A. Of course I had the fog on this side (showing). The fog was like a wall, and I could see perfectly plain the south shore all the way down almost to Fort Point.

Q. There were some witnesses here that were on the Oceanic that testified that they could see you for perhaps a half a mile away. Can you explain that when you could not see them in that distance?

A. I can't understand how they could see a half a mile off, but I can very readily see that they could see us further than we could see them, for the simple reason that it is the same looking into a room that is all lit up from the outside where it is dark; if you are looking into the room where there is light, you can see everything in it. If you are looking out into the dark, you can see nothing. Here the sun was shining perfectly clear (referring to the position of the Chester), and I was looking out against this wall of fog, and they were looking in the other way, and they may possible have seen a little bit further than I could. I

have noticed that lots of times going out to the heads. And while you are coming in you can see quite a long ways, but going out you can't see a thing.

Q. That is when you are in the fog; one that is in the fog and looks out can see further than one that is outside the fog and trying to look in it?

A. No; that one that is in the fog and looking in where it is clear.

Q. I am referring to being inside the fog bank, the outside ship that is in the tog bank looking out on the clear sky, can see further than the one that is in the clear atmosphere trying to look into the fog?

A. Yes, sir

Q. So that they might have been able to see further than you could?

A. Very likely.

Q. You were your own pilot?

A. Yes, sir.

Q. Under the State law authorizing you—

A. (Interrupting). Under the United States law, sir.

Q. (Continuing). Authorizing the master of a coast vessel to be his own pilot?

A. Yes, sir.

Q. I will ask you whether or not you know Mr. Westdahl of the United States Survey here?

A. Yes, sir.

Q. I will ask you whether or not you pointed out to him as near as you could the point where this collision occurred?

A. Mr. Barnes—I object to that. I don't care what he did with Mr. Westdahl.

Mr. White—Of course you don't care, but I do.

Mr. Barnes—I mean to say—perhaps that wasn't the nicest way to express myself—I intended to say that I object to his making any statement as to what he did with Captain Westdahl, on the ground that it is incompetent, irrelevant and hearsay.

Mr. White—I propose to show by Captain Westdahl that he obtained information from Captain Wallace of the position where this collision occurred, and that then we went out on behalf of the authorities, and having located that point, he, at a time that the tide was the same that it was on that morning, he turned a tug loose at that point to see where the tide would carry her, allowing the tug to float in the same tide from that point for the length of time that the Chester floated after the collision. He determined the force of this tide and the direction it took, and having allowed the tug to float that length of time, he tried that three different times, in order to verify his observation, he concluded that he had arrived at a point where the wreck of the Chester ought to be, and sounded, and found her there. We want to prove that he pointed out to him the place, and then by proving by scientific observations, we will prove that the place pointed out by Captain Wallace corresponded exactly with the place where the collision ought to have occurred in order to bring the wreck to that place; and I expect to prove that the wreck of the Chester occurred just where Captain Wallace says it occurred. And that is now just where Mr. Westdahl found it, after being told by Captain Wallace of the place where the collision occurred.

The Court—That would be matter for Mr. Westdahl to testify to. I will sustain the objection.

Mr. White—We shall except.

Q. Without saying what you told him, did you tell Mr. Westdahl anything whatever in regard to giving him any information in regard to where this collision occurred?

Mr. Barnes—That is the same question, and we object to it on the same grounds.

The Court--The same ruling.

Mr. White—We take an exception.

Q. Well, will you state now, so that I may understand you, about how far from Fort Point buoy the collision occurred ?

Mr. Barnes—I object to that, he has stated that twice; there is no use taking up time with that.

The Court—Objection sustained. He says he was about 150 feet north of that Fort Point shoal buoy.

Mr. White — I understand he answered that question that way. He said that when he first saw the Oceanic that he was about 150 feet off that buoy.

The Court—What is your question now ?

Mr. White—I want to ask him where the collision occurred; how far off?

The Court—I will let him answer that.

A. About 600 to 650 feet.

Q. Was there anything in the situation of the "Chester" that prevented getting out more boats than you got out ?

Mr. Barnes – I object to that as irrelevant and immaterial.

The Court—I will let him answer.

A. Yes; most of the crew were engaged in passing the passengers up over the bow, according to my orders My judgment told me that was the best way to do to get the passengers ashore; and there was, I think, three men and the second mate that got one boat out, and two quartermasters and somebody else, I don't know who it was, got one of the other boats out, but the ship went down so fast she got to be standing right on end before we got them out; it was hard work to stand on the deck or do anything with them; that was the reason there were not more boats gotten out.

(No cross-examination.)

RUFUS COMSTOCK. Called for the plaintiff, and sworn, testified as follows:

By Mr. White—Q. What is your name?

A. Rufus Comstock.

Q. What is your calling?

A. Engineer.

Mr. Barnes—We understand, Mr. White, that he was second engineer on the "City of Chester." Now, let's go ahead with him.

Q. Were you the second engineer of the "City of Chester" on the 22d of August, 1888?

A. The second assistant.

Q. You were on duty in the engine room on that morning?

A. I was.

Q. Go on and state what occurred up to the time the vessel went down, and afterwards.

A. We left Broadway wharf about five minutes after

nine, I think, and ran full speed until about a quarter to ten, I should judge; and then we slowed down to half speed, and, I should judge, about a minute or a minute and a half, may be it might have been longer, after that when we got a bell, "Full speed astern," and I should judge she was backing about a minute and a half, or it might have been two minutes, when we felt a little jar; it didn't amount to much; then, immediately after that we got a bell to stop; that was the last bell we got.

Q. Was that last bell obeyed?

A. Yes; every bell was obeyed just as soon as it was rung.

Q. Well, after you got the last order to stop? Go on and tell what you did.

A. The fireman came up in the engine room shortly after that and told me that there was water coming in through the bulkhead forward of the boilers, and I went down with him to look through, but I could not see it; I could hear it—it was too dark to see—and I came up again in the engine room, for I thought I might get a bell, although the chief was there, and he could have done that if he did get a bell; and after a little while the fireman came up again and told me the water was coming down pretty fast, and I went down the second time, and while I stood there looking through—looking through there between the boilers to see how much water was coming in—I felt her break loose from the "Oceanic" and went down at the head, and I thought it was pretty near time to get out, and I went up as quick as I could, and when I went in the engine room the fireman had left, and the chief sung out for all hands to get out of it, and I was in the upper end of

it, near the engine room door, and then the water was coming through not twenty feet from me, so I ran back through the cabin to the fan-tail end of the ship, and I jumped over onto the guard and then into the water and got into one of the "Oceanic's" boats.

Q. Did you notice where you were when you came up—where the collision occurred—when you came up from below?

A. The first land that I saw—that was about the time that I got into the "Oceanic's" boat—that was Fort Point. We were pretty close to the shore.

Q. When did you see that?

A. That was about the time when we got into the "Oceanic's" boat—just as I was getting in—about five or six minutes after the collision.

Q. How far off were you from Fort Point?

A. I didn't notice exactly, but I know that we were not very far; I shouldn't think it could have been a quarter of a mile. I don't think it was over a quarter of a mile. I know that we were pretty close into Fort Point buoy—must have been at the time of the collision.

By Mr. Barnes—Q. You had nothing to do with the steering of the ship?

A. No, sir.

Q. Your work was all below the deck?

A. Yes, sir.

JOHN LUNDINE. Called for the plaintiff and sworn. Testified as follows:

By Mr. White—Q. What is your name?

A. John Lundine

Q. Were you second officer on the steamer ' City of Chester" at the time she collided with the "Oceanic," on August 22d, 1888?

A. Yes, sir.

Q. What was the condition of the weather that morning?

A. It was foggy.

Q. What time did you leave San Francisco?

A. A few minutes after nine; I didn't notice the time exactly; I didn't notice it just to the minute.

Q. Where were you; at what place on the vessel?

The Witness—Well, when we left the wharf?

Q. When you left the wharf.

A. I was aft taking my lines in.

Q. Were you on deck?

A. Yes, sir.

Q. What point on the deck?

A. Just in the stern of the ship, until we had cleared the wharf, and when everything was cleared I went below.

Q. After you got into the fog, where did you go?

A. I just came up on deck then.

Q. Where did you go on deck?

A. Right on the fore part of the deck.

Q. Right on the bow of the ship?

A. Yes, sir.

Q. Did you hear any whistle blown from any other ship?

A. I heard it after we got down towards Fort Point.

Q. Where did it appear to be?

A. I heard it on the starboard bow.

Q. Could you see the other vessel at that time ?

A. No, sir.

Q. Were there any signals given ?

A. Well, that fog signal.

Q. Well, what were the signals ?

A. One whistle, then we heard two; we heard a whistle, and immediately afterwards we heard two.

Q. That is, two different signals given by the other vessel ?

A. No, you always blow one whistle when it is foggy, and then you hear two whistles, and we blow two; I don't know how much we blowed; we usually blow two whistles; I don't know.

Q. Well, as I understand you, the first whistle that you blowed was the fog whistle ?

A. Yes, sir; that is right.

Q. Then afterwards you heard two whistles sounded ?

A. Yes, sir.

Q. Could you see this other ship at the time these whistles were sounded ?

A. No, sir; if we could see her, there would be no necessity of blowing the whistles then.

Q. Where was your vessel at that time ?

A. I don't know what position exactly. I know we were not quite up to Fort Point, but pretty close to it.

Q. How far oft were you from the south shore?

A. I didn't notice that; pretty close. If we had gone along our old course we would have been within a ship's length of the buoy.

Q. Could you see any land there anywhere ?

A. I saw the south shore.

Q. You were then about a ship's length from the Fort Point buoy?

A. Yes, sir; if we had been up there. We wasn't quite up there when we heard the whistle.

Q. What direction, judging from the sound, did the other ship appear to be from you?

A. One and a half or one and three-quarter points on the port bow.

By the Court—Q. I thought you said you heard the question on the starboard bow?

A. Yes, that is what I mean.

Q. Where did you see this vessel first, from the starboard or the port bow?

A. The port bow.

Q. You heard the whistle on the starboard bow?

A. Yes, sir; and I saw her on the port bow.

By Mr. White—Q. When you saw her, where was she?

A. She was—I don't know exactly how far off she was. I know she was pretty close. I know, when she loomed up in the fog, I told the passengers to stand clear of the ship; I saw her coming into us.

Q. In what direction was she from you then?

A. Well, she was headed like this ship was headed now, something like that (showing).

Q. Where were you when the vessels actually struck together?

A. I was right on the forward part of her, and she came into us about there (showing), and I was on the fore part, telling the passengers to get out of the way.

Q. At what point on the Chester did the bow of the Oceanic strike her?

A. I don't know; about twenty feet from the bow, or twenty-five; there was about two feet from the mast, and then we had a hatch that was 12 feet, and then on the fore part, the hatch combing was struck.

Q. How many feet back from the extreme point?

A. About twenty feet.

Q. How far into the Chester did the Oceanic go?

A. About half of it; about ten feet.

Q. How wide was the Chester at that point?

A. I don't know her beam there exactly, sir; I forget.

Q. Do you know what motion, what direction your ship, the Chester, had at that time?

A. She was backing.

Q. How do you know?

A. I felt the shaking before I saw the Oceanic.

Q. What occurred after the vessels actually came together?

A. Well, the Captain sang out to pass the passengers on the Oceanic, and a minute or two afterwards I went to to the boats; it might have been a minute, probably it was two, when I started the boats on top of the house; we had another deck on top of the house.

Q. Did you get out any boats?

A. Well, I got one out and the other one started. We had all the lashings cut on all of them.

Q. How did it occur that you didn't get it out?

A. The ship was too much on end. I couldn't swing the davits.

Q. With the bow down in that way (showing), the boats were tilted the same way, and when you tried to lower the boats they would be swamped?

A. Would be swamped. The ship standing that way (showing), we couldn't get them clear of the railing.

Q. Who helped you to get out the boats, if anybody?

A. I had four men with me.

(No cross-examination).

JAMES J. LOGGIE, called as a witness for the plaintiff. Sworn. Testified as follows:

By Mr. White—Q. What is your name?

A. James J. Loggie.

Q. Where do you live, Mr. Loggie?

A. San Francisco.

Q. Were you a passenger on the Chester at the time she collided with the Oceanic on August 22d, 1888?

A. I was.

Q. Go on and state everything observed by you on that occasion?

A. After leaving the wharf I was on the main deck.

Q. What kind of weather was it?

A. The weather was clear—sunshine—and I stood there on the deck until we got about past Presidio, I should judge, and then we encountered the fog. It being cold, I went in what was called Social Hall, which was in a room off the main deck, and I sat in there I don't know how long, until I heard the engine stop, and then I remarked to some friend —

Mr. Barnes (Interrupting.)—Never mind, we object to his stating what he said to his friend.

The Court—Don't state what you said to anybody else, just state what you did.

A. On noticing that the engines had stopped, I went

outside to see what the matter was, and I observed a steamer, a large vessel ; I did not take notice that it was a steamer, but I observed a vessel about, I should judge, 100 yards from us, and I immediately turned and went back into the room that I had left, and returned at once, and when I got back I saw that the two steamers—that the two vessels had come quite close together, and I also noticed that the passengers were running away from the bow of the vessel; I at once turned to this room on account of the danger ; I was afraid that the splinters and spars from the collision would hit me, and I returned to this room again and stayed in there for probably not more than a minute, and I came out again and went forward to see what the chances were of getting ashore, and when I got there the vessels had separated, and the Chester was going down very rapidly. I saw there was no chance to get off on the Oceanic, and I returned to about midships, or a little further aft, to the after rigging, and I helped a lady passenger that I was trying to save, left her holding on to the rigging while I went to the state-room to get life preservers. I went in and got the life preservers out from underneath one of the berths ; it was attended with a little difficulty to get them out. I don't know how long it was I delayed in there, and when I returned with them I just had barely time to hand one of these to the lady passenger, and the other I obtained myself, and I held on to her with one arm and with the other I held on to the rigging, as the steamer was tipping very fast, and in that position I went into the water. I don't know how far down I went, but I heard an explosion while under the water, and I felt myself twirled through the water on to the surface. When I

got to the surface of the water my first thought was to look after a boat for some object to get hold of, and I noticed a boat, I can't remember just how far off from me, and I swam to the boat, and was hauled in by the men in charge.

Q. At the time you went forward, did you see how far the "Oceanic" had got into the "Chester"?

A. No; I don't remember.

Q. Did you see any land while you were there?

A. I don't remember seeing any.

(No cross-examination.)

James Rankin. Called for plaintiff and sworn. Testified as follows:

By Mr. White—Your name is James Rankin?

A. Yes, sir.

Q. What is your business, Mr. Rankin?

A. Keeper at Fort Point; Fort Point lighthouse keeper.

Q. Were you such lighthouse keeper on the 22d of August, 1888, at the time the "Oceanic" and the "Chester" collided?

A. Yes, sir.

Q. Where were you at the time of that collision?

A. I was about 200 feet from the extreme point of Fort Point, on the bluff.

Q. About 200 feet from there. In what direction?

A. Due south, 200 feet.

Q. Back up high on the ground?

A. Yes; up on the bluff.

Q. Did you see that collision?

A. No, sir.

Q. Go on and tell the Court what you heard on that occasion?

Mr. Barnes—I object to his telling what he heard if he didn't see anything.

Mr. White—You can repeat the hearsay of steamers.

The Court—Is it the sound of the whistles of the boats that you wish to prove? As to what kind of noises he heard?

Mr. White—Yes, and where it appeared to be.

The Court—I will overrule the objection and hear what it is.

A. About half past nine o'clock I heard a steamer come in blowing a fog whistle.

By the Court—Q. You heard a steamer come in?

A. Yes; she seemed to be going along pretty slow, because she was some time getting up; didn't seem to be getting in closer by her whistle; not much closer. After that I heard the whistle of a vessel going out to sea. She would be, judging by the sound, about opposite the Presidio wharf. They were both going slow by their whistles; didn't seem to be making much headway, but the incoming vessel seemed to be going slower over the ground than the outgoing vessel. They were both coming up close to Fort Point, and I began to think that it was getting dangerous, and I paid more attention to it, and I heard the "Oceanic," the vessel coming in shore, blow two whistles, and I heard the outgoing one blow two whistles in answer. By that time they were nearly opposite Fort Point, not far off, by the sound, but still I could not see them. Then the incoming vessel blew two whistles.

By The Court—Q. That is the second time?

A. The second time the outgoing vessel blew two whistles, and then I heard a crash, and shortly afterwards I told the assistant——

Mr. Barnes—Wait one moment.

The Court—That would be objected to. Don't state what you told anybody.

A. May I state that I sent a man down to telephone into the Merchants' Exchange that there was a collision off Fort Point, and to send out a tug, and at no time did I see either of the vessels, but I thought at one time—about two minutes afterward—that I seen a white streak, but that was just as much imagination, probably, for I could not be sure of it.

Q. Is there a bell at Fort Point?

A. Yes, sir.

Q. Was that bell ringing at that time?

A. Started at 3 A. M. and stopped at 1 P. M. the next day, ringing all the time, 1:20 P. M.

Q. Were you not at the bell the first time?

A. I was within sound of it.

Q. But not at the bell?

A. No, sir.

Q. You were not on the Fort?

A. No, sir; I was up on the bluff above it, about 60 feet to the south from the fort.

Q. Did you see the fort from where you were?

A. I could not see the fort; I couldn't see the flagstaff about a minute after. And first I looked down the road to see if I could see the man that was going to the telephone station, to judge the distance, because I thought the inspector would ask me. It is measured; there is 700

yards of range measured off there for shooting, and one-half that distance I could not see the man, and then I looked over towards the fort to see whether I could not see the flagstaff, and I could not see it; and at times the fog would clear a little so you could see clearly for some distance, say a mile, and then the fog would shut down for fifteen minutes and I could see up as far as the city along the shore. But a little off from the shore it was quite foggy. But at the time of the collision, about one minute after the collision, I could not see the flagstaff 200 feet off. I looked to see if I could see the boy, and I couldn't see him.

Q. How far off were you from the boy?

A. About a cable's length, about 120 fathoms.

Q. 600 feet.

A. About that.

'y the Court—Q 730 feet.

A. Yes; 730 feet.

By Mr. White—Q. How distincly did you hear this noise of the crash and collision?

A. Well, it was pretty distinct, but then I felt—I wasn't quite sure whether I had better send for a tugboat to send out there for nothing. Then I came to the conclusion it was better to telephone right in. I knew there was nothing else but the two vessels coming together to make this noise in that direction, and hearing the whistles go, I determined to be on the safe side, and I telephoned to the Merchants' Exchange. It wasn't very distinct, but still I could hear the crash, and I could hear voices, but not very much of an uproar of voices. I could hear a few voices muffled—a muffled sound.

Q. Could you tell from the whistles they sounded, and from the noise made by the collision, how far off in the channel they were?

A. I could not; I could not be sure.

Q. Well, what was it, according to your judgment?

The Witness—When the collision happened?

Q. Yes.

A. I would judge, drawing a line from Fort Point to Lime Point, I would judge it to be one-third of the distance across, and about one-quarter of that distance towards the city.

Q. Towards the east?

A. Yes, sir.

Q. You think, drawing a line from Lime Point across to Fort Point, that it was about one-third of the distance across there and a little inside that line?

A. Yes, sir.

Mr Barnes—Well, mark the place, will you?

(Witness then marks said place with small cross and R).

(No cross-examination).

Ferdinand Westdahl. Called for the plaintiff and sworn, te-tified as follows:

By Mr. White—Q. What is your official position?

A. I am a draughtsman in the United States Coast and Geodetic Survey.

Q. And you say you are also an expert mariner? At least, you have a Master's license?

A. Yes, sir; I am educated for a Master Mariner.

Q. So that you are familiar with matters of navigating ships?

A. Yes, sir.

Q. After this collision occurred between the Oceanic and the City of Chester, did you take any steps to locate the Chester?

A. Yes, sir.

Q. What did you do, and what did you discover?

A. I was sent out there by my official superior, Professor Davidson, of the Coast Survey, to experiment upon the force of the current in the Golden Gate; and it was at the request of Captain Wallace, of the City of Chester, that we went out in a tug and made three drifts in the Golden Gate, stopping the tug at a certain position and letting her drift; and I determined her position for every minute of the drift. We drifted each time eight minutes. I don't remember what interfered with the operation the first time we were out there, whether it was foggy or not. I am not quite sure. At any rate, we didn't finish and went out some time afterwards and tried it again in another steamer, the Gypsy.

Q. That is, another tug?

A. No; she is a steamer. The Gypsy is not a tug; she is a steamer. And we swept along the bottom with a line weighted with grate bars and window weights until we finally caught on to what we supposed was the City of Chester, the wreck of her. I determined where she was then, or what we supposed was the City of Chester, where it lies.

Q. Well, now, I have here one of the charts that General Barnes has been so kind as to furnish. Have you done any work on this chart in reference to this?

A. I found my old notebook, the notebook that I used

in the work, and I have plotted on here the position of the tug for every minute's time. The first drift is thus represented by the red lines; the tug was brought out here (showing), stopped, and when she was at a dead stop, couldn't go any further, or, rather, didn't go any further, we left her drift, and the first minute she went from there to there (showing), the third minute from there to there, the fourth from there to there, the fifth from there to there, the sixth from there to there, the seventh from there to there, and at the end of the eighth minute she was here (showing).

Q. Now, what time was that in the day?

The Witness—Can I refer to my note for that?

Mr. White—Yes, sir.

A. (The witness referring to notes)—It was on September 5th, at 10 hours, 10 minutes and 30 seconds. First, when the angle was taken, 19 minutes and 30 seconds; the second, 20, 30; then 21, 30; 22, 30; 24, 30; 25, 30; 26, 30; 27, 30; and that was the end of the first drift.

Q. Now, I will ask you why you went out there on September 5th?

A. It was to get the same conditions of the tide as on the day of the collision.

Mr. Barnes—I move to strike that out; let him state what the conditions of the tide were.

The Court—Strike it out. State what the conditions of the tide were.

A. The tide was flood.

Q. How long?

A. It was about half flood. Can I refer to the records

for it? That is the only way I can determine it, by the records of the tide.

By the Court--Q. What records do you mean?

A. These tide books (witness produces tide table). The tide here is given for North Point; the tide, of course, makes a little earlier here, probably ten minutes; but that is such a small factor that it would not operate upon, or effect this in any way. Now the collision occurred on August 22d.

The Court—You just give your tide when you went out there.

A. On September 5th it was low water at 4:40 A. M., and the following high water was at 11:29 A. M.

By the Court—Q. What time were you out there?

A. I was out there at 10 o'clock; it was nore than half tide.

The Court—Oh, yes; it was nearly full tide.

A. Yes, sir.

By Mr. White—Q. Is that an official document?

A. Yes; that is the tide table, the predictions of the tide made by—

Q. (Interrupting). Well, now, turn to August 22d and see what the facts were then as to the tide.

A. On August 22d it was low water at 5:53, and the following high water was at 12:53.

By the Court—Q. Did you take a drift that day?

A. No; that is the day of the collision.

Q. But then this collision was in 1888.

A. Oh, yes; this was in 1888.

Q Was this September of that year?

A. Yes, of that year.

By Mr. White—Q. I want to ask you whether the condition, so far as your record show as to the tides, whether the tides were practically the same on September 5th that they were on August 22d?

A. It was later in the tide.

Mr. Barnes—How does he know? He can't know.

Q. It was later in the tide, and for that reason you took a later hour?

A. I went out there, and Captain Wallace had charge of the tug going out there, and at his request I went out there to make these experiments at the earliest possible time that we could get off. I remember it was foggy first and you could not see anything. I wanted to see the landmarks to take the angle and so we got out later in the tide on that account.

Q. Well now, when was the next time that you made a drift?

A. On September 10th.

Q. What hour in the day?

A. It was from 8 to 10 A.M.

Q. What kind of a tide was running at the time?

A. It was flood tide.

Q. By Mr. Shay—How far in the flood tide?

A. I don't know.

Mr. White—Q. How did that tide correspond with the tide on August 22nd?

A. If I can refer to the records I can see; otherwise I can't.

The Court—Well, state what you find in the records.

A. On September 10th it was low tide at 5:55 A.M., on August 22nd it was low water at 4:34 A.M., and on Sep-

tember 10th it was high water at nine minutes after 12. On August 22nd it was high water—excuse me, I got it wrong; I got San Diego instead of San Francisco.

Mr. White—Then that all goes out.

Mr. Barnes—Yes, strike that all out.

The Court—Let it all go out. Now get to San Francisco, and be sure that you have got San Francisco now.

A. Yes, I got San Francisco. On August 22nd it was low water at 5:53 A.M., and the following high water was at 12:53. On September 5th it was low water at 4:40 A.M. and high water at 11:29 A.M.

By the Court—Q. And your observation was taken that day at 10 o'clock?

A. On that day my observation was taken at 10 o'clock, beginning at 10:19. The second drift was made on the same day. All the three drifts experimenting with the current were made on September 5th, and on September 10th nothing else was done than to determine the position of the wreck.

Q. Was the second drift followed immediately after the first?

A. As quickly as we could steam back we stopped her again.

Q. And the third followed the second on the same day?

A. Yes, sir; the same day.

Q. What time did you get through with the third drift?

A. 10:56, thirty.

Q. That was extreme high water.

A. No, sir; the high water was much later than that.

Q. How much later than that?

A. High water was at 11:29. As a matter of fact, the drifts show a continual receding to the south shore; the three successive drifts.

By Mr. White—Q. All three drifts that you made there were made on September 5th?

A. September 5th.

Q. What were they made with?

A. With a tug.

Q. Now, it was at a different that time you located the wreck, September 10th?

A. Yes, sir.

Q. Have you indicated on this chart where you found the wreck?

A. Yes, sir.

Q. Where is it?

A. Right there (showing).

Q. Where is that, the forty-fathom mark?

A. That is the forty-fathom mark immediately to the southward of it.

A. Assuming, now, that six minutes occurred—

Mr. Barnes—It took eight minutes, he says.

Mr. White—Well, I am not taking eight minutes, now; I am taking six minutes.

The Court—Well, he has got them all marked on the chart.

Mr. White—Well, I want to measure from the wreck right the other way?

Q. Taking the point of the wreck as located by you, and assuming that six minutes elapsed from the collision until the steamer sank, and taking into consideration the way

that tide flows, at about what point would be the point of collision?

A. If the tide were exactly the same as it was at the time of these experiments, the vessel could not be there at all unless the collision occurred exactly one-third of the way from Fort Point over towards Lime Point, if not further.

Q. Do you say about that thirty-fathom mark ?

The Court—No, fifty.

The Witness—It occurred up here, but these experiments not being carried out at the same state of the tide, the current sweeping across the gate here was not as strong, possibly. In other words, this was later in the tide when these experiments were made than at the time of the collision, as I understand it.

By the Court—Do you know anything about this tide up here (showing)?

A. The tide sets straight in, except, of course, immediately in shore, as the tide would strike against any point.

By Mr. Barnes—Q. I didn't understand what qualification you were trying to make in saying that the tide was not as strong at one time as the other. At which time was it stronger?

A. In the beginning of the flood it would set further over than it does in the latter part of the flood.

Q. So that at the time you made these drifts the tide was not as strong as it was at the hour of the collision, that being earlier than 10 o'clock?

Mr. Barnes—I object to that.

The Court—Yes; that is a matter for argument.

CROSS-EXAMINATION.

Mr. Barnes—Won't you be kind enough to mark upon this map, this duplicate underneath here, a position where you say you found the wreck on the 22d of September?

The Witness—On the 10th of September.

Mr. Barnes—Well, whatever the day was.

(Witness hereupon marks point on the map.)

Q. Now, did you take the depth of the water in which she lay?

A. No, sir.

Q. Then you are unable to state to the Court at what depth of water you found her?

A. Not except where it puts the position on the chart.

Q. I am asking you if you know the exact depth of the water she was laying in?

A. I don't remember that we took the depth of water.

Q. What bearings did you take to determine her position?

A. I didn't take any bearings; I measured angles.

Q. How did you fix her there then?

A. By measuring sextant angles between Alcatraz and Lime Point, the whistling buoy and Bonita Light.

Q. Supposing the position of the ship is, in point of fact, not there (showing), but here, indicated by the conjunction of these three lines, this line contracted from Point Bonita, passing Point Diablo, and extended to here, then across to Point Bonita here, and then across to the south to this place (showing on the map), where would you say, assuming the ship to have been found at the point marked "B." on the map, where, according to your experiments with the currents, did the collision occur?

Mr. White—Assuming also that it occured six minutes before she sank, that she kept afloat six minutes?

Mr. Barnes—Yes, sir.

A. Well, if that is the case, if the ship should lie there, I should think that the collision had occurred here, somewhere (showing).

Mr. Barnes—Won't you just make a little mark there?

(Witness marks place on map.)

The Witness—That is simply a judgment of mine.

(Further hearing continued until 10 o'clock Wednesday A. M., September 13th, 1893.)

WEDNESDAY, September 13, 1893.

MRS. ELIZA A. SMITH, the plaintiff. Sworn.

Mr. White—Q. You are plaintiff in this case?

A. Yes, sir.

Q. Where do you live, Mrs. Smith?

A. Sacramento, California.

Q. What was your late husband's name?

A. Henry Smith.

Q. Were you and your husband and children on board the "City of Chester" on the morning of August 22d, 1888?

A. Yes, sir.

Q. Go on and state to the Judge from the time you went on board that vessel up to the time that the collision occurred, and afterwards, what did occur, so far as you saw and heard?

A. Well, I don't know what time of day it was that we got on; we took a second class passage, and we were on

deck at the time and had been. At one time we went down to get a drink for the children. The rest of the time we were up on deck. There was nothing particular to speak of, as I know of, until we heard this other vessel whistle, and then we turned to look at that and see it. From the time I first heard the vessel until it collided with our steamer, I did not have any idea of any danger. I did not think anything about it striking us, although I thought it would pass very near. My husband was there right with me. We were sitting this way, with the three children and my sister. That was all; my husband with the three children and my sister and myself.

The Court—Q. Which side of the boat were you on going out?

A. Very near the front part of the boat. There is a raised portion there very near the center. We were sitting on that looking back from where we started, until we heard the whistle. Then we stood and looked back the other way, to see this boat coming towards us.

Q. What was the condition of the weather? Was it clear or otherwise?

A. Most of the time it was clear. There was some fog at times; not so but what we could see the other steamer all the time after I heard the first whistle.

Mr. White—Q. Could you see any land?

A. On the left hand side I could see it plainly; off that side (pointing).

Mr. Barnes—Q. The land or the ship?

A. The land and the ship, also.

Q. Which way do you mean by the left hand side?

A. The way we were going when I turned to look at the other side.

Mr. Barnes—Q. Ask her where she stood.

The Court—Where were you standing?

A. This is the "Chester," and we were somewhere here (pointing).

Q. On this upper deck?

A. Right here (pointing). As near as I know, we were in front of this bridge. We were right here sitting on a portion that was raised. We were looking off in this direction. We were sitting there facing this way, and when we heard the other steamer's whistle, we turned directly round and looked in that direction. This is where I saw the land, off to this side.

Mr. Barnes—Q. Where did you see the steamer?

A. Off there.

The Court—Q. About this way?

A. No, sir; a little to this side.

Mr. White—Off to the front and a little on the left hand side.

A. Yes, sir.

Q. Where was the land?

A. Right off here—the south shore.

Q. Can you tell how far off the land was from you?

A. I could hardly measure the distance on water. I don't know as I could hardly tell. I am not used to being on water.

Q. Which was nearest to you when you saw the other steamer, the land or the steamer?

A. I think the land was nearest. The land was nearer than the other steamer when I first saw the steamer.

Q. The land was nearer than the other steamer?

A. Yes; sir.

Q. Were either of the steamers surrounded by fog at that time?

A. Not when I first saw them they were not.

Q. Were they at any time?

A. Not so but what I could see them. There was some fog settled over the other steamer and kind of drifted down between the two. I could see the steamer all the time after I first saw it.

Q. After you saw the steamer, go on and tell what occurred.

A. We looked right off in that same direction and watched it until it came up. When it got very near to me, my husband said, "step back." We stepped back to this opposite side near the rail.

Q. Over on the other side?

A. Yes. When it struck we started for the other steamer and got over into the other steamer.

Q. Tell us just what did occur, about your getting on the other steamer.

A. When we first got there, my husband was very near to me—nearer than I am to you. We were all right there together. I had my little boy in my arms. He was a year and a half old—a little baby. I handed him up to someone on the other steamer.

Q. He was only a baby at that time?

A. Yes, sir. My husband had the other two children by the hand. I was taken over. I don't know whether my sister got over ahead of me or not. I did not see her get over. I was taken over. I was dropped down among

the freight on the other steamer. I climbed up to see where my husband was. I suppose he got right over after me. I climbed up to look over the edge of the steamer. I saw him back of a circle of may be two or three dozen people, with the two children in his arms. I heard Georgie, the boy, screaming. I started to see where he was, and when I looked again the other steamer had sunk.

Q. That was the last you saw of your husband alive?

A. Yes, sir.

Q. Afterwards his body was found and you identified it fully?

A. Yes, sir.

Q. Your little girl Myrta you never did see again?

A. No, sir.

Q. How old was she at the time?

A. Four years and a half.

Q. What was her condition of health?

A. Good health.

Q. How old was your husband?

A. Thirty-two years.

Q. How long had you been married?

A. About five years and a half.

Q. What was the condition of your husband's health?

A. In first-class health, splendid health.

Q. What was his business?

A. He had just given up the dairy business; he had been in the dairy business.

Q. The keeping of cows and selling of milk to the inhabitants of the city of Sacramento?

A. Yes, sir.

Q. Now, I desire you to give the Judge some knowledge of your husband's ability as to providing for his family. Can you tell how much from his own exertions your husband was in the habit of making per year?

A. I could not tell exactly, but I might make some estimate of it.

Q. Give the best knowledge that you have on the subject.

A. Well, he supported the family—himself, myself and three children, my father, my sister, and perhaps maybe from $50 to $75 a month over that, as near as I can tell.

Q. How much were the family expenses per month?

A. It must have been, as near as I can tell, from $75 to $100 per month.

Q. What property, if any, had your husband accumulated from the time of your marriage up to the time of his death?

A. He had some land in partnership; he owned half of it; 160 acres of land, about 45 head of cows, and about 10 or 15 head of horses, — mules.

Q. Did he have any money?

A. Yes, sir, he had some money; he had some on his person when he was lost.

Q. How much did he have with him, if you know?

A. He had very near $500 as near as I know.

Q. That you never saw anything of again?

A. No, sir; besides that he had farming implements and hay and cattle.

Mr. White—It is not pertinent to this case, but some ghoul robbed the body of this money.

Q. About how much was all this worth?

Mr. Barnes—I take it that these horses and mules and land and farming implements were not lost?

Mr. White—No.

Mr. Barnes—Then what is the point of it?

Mr. White—I do not offer it as showing they were lost.

Mr. Barnes—Then what is the object of it?

Mr. White—A certain amount of property that he had at the time of his marriage, and a certain amount he had at the time of his death. The difference was what he accumulated in those five years and a half in addition to supporting his family. I offer it as some evidence, it may not be very strong, of showing the ability of the man in the direction of accumulation of property, tending to show his worth.

The Court—She has already testified as to the amount of his income from the business he was engaged in. That is direct. Now you propose to give indirectly his income by the amount of his property that he had five years before and then the amount that he had at the time of his death; is that the idea?

Mr. White—To some extent. It is in the nature of what might be asked to test the credibility of the witness or the knowledge of the witness on cross-examination. I have a right, I think, to go into the particulars. After the witness states a general conclusion, I have a right to go into particulars to show that necessarily that is true.

The Court—If General Barnes makes no objection, the Court will take it; but there are so many elements of increase in the value of the property.

Mr. Barnes—It cuts no figure, and it is wholly immaterial. I am willing that the lady should say anything that she wants to say.

The Court—Go on; the General will not object.

Mr. Barnes—No; but it cuts no figure whatever in any assessment of damages.

A. I can hardly tell without estimating it; I don't know without counting it up.

Mr. White—Q. Count it up; take a piece of paper.

Mr. Barnes—Q. How much do you say he made after his marriage?

Mr. White—Q. Above expenses?

Mr. Barnes—Yes; he had been making from $50 to $75 a month over and above his family expenses ever since their marriage, and they had been married five years and a half. What more do you want?

The Court—How much do you say he accumulated during the five years?

Mr. White—He made about $50 to $75 per month above the family expenses.

Mr. Barnes—We do not want to go into an inventory of his mules, horses and live stock.

Mr. Barnes—No questions.

Mr. White—There were a few questions that I omitted to ask Captain Wallace yesterday. I should like to ask them now.

The Court—Very well; let him take the stand.

Thomas Wallace. Recalled.

Mr. White—What was the speed of the "City of Chester" when she was going at full speed?

A. About 10 knots; ten and a half at the outside.

Q. You said yesterday that she was slowed down before this collision occurred; slowed down, as I understand, about the Presidio or earlier than that. After she was slowed down, and from that time until you again changed her rate of speed, what speed was she going at?

A. Going along probably about 6 knots when we stopped her; five and a half to six knots when we rang the bell to stop and go back.

Q. That is 6 knots through the water, without taking into consideration the tide at all?

A. Through the water.

Q. Do you know at what rate the flood tide runs in when it is in a condition it was at the time you were going out that morning?

A. It runs from 5 to 6 knots.

Q. Then you were going out at about 6 knots, and when you struck the tide against you, you struck the tide of about 5 knots, or 5 or 6 knots?

A. Yes, sir.

Q. How fast were you going after you had slowed your steamer up to the time that you heard the first signal from the "Oceanic," as compared with the land?

A. I must have been passing by the land about 4 knots an hour. There was probably a tide running 1 knot against us; 1½; something like that.

The Court—Q. What do mean by inside? Inside the buoy?

A. That is the way I understand the question.

Mr. White—Q. You mean inside the point here (pointing).

A. Yes, sir.

Q. Before you struck this hard tide ?

A. Yes, sir.

Mr. Barnes—No questions.

E. S. Talbot. Called for the plaintiffs. Sworn.

Mr. White—Q. What official position, if any, do you hold ?

A. Inspector of Hulls.

Q. That is Inspector of Hulls of steam vessels under the United States Government employment ?

A. Yes, sir.

Q. Have you ever been a mariner ?

A. I have.

Q. Are you familiar with the navigation of ships and with the rules of navigation and the laws of the United States relative to the control and government of ships ?

A. Somewhat

Q. Does your official position make you study those matters ?

A. It does. In the first place I would like to object to testifying, if possible.

The Court—Q. On what ground do you object ?

A. Being connected with these cases—having these collision cases coming before me. I get abuse enough without coming up here to testify.

The Court—We all have to suffer abuse. What do you propose to prove by this witness ?

Mr. White—I propose to use him as an expert witness to ask him, like in the English cases they do the elder brethren of the Trinity House, to state a hypothetical

question to him, and upon that hypothetical question to take his opinion as to whether or not the management of these ships was a proper one or whether there was any fault or negligence on the part of either or both.

The Court—I do not think that is admissible under our practice. The practice prevails in England. They sometimes refer cases to Brethren of the Trinity, but that is not the practice here.

Mr. Barnes—Your Honor is aware that before the witness and one of his associates, as Inspectors, there was a hearing with reference to Captain Wallace. They took testimony, sitting as Inspectors, and acting quasi judicially they made a report to Captain Lubbock, who is the Chief Inspector. As I say, there is manifest impropriety now in calling the Captain here as a witness to put to him a hypothetical case based upon a hearing in point of fact had by him long ago, in which as a Judge he had made up his mind, and made a report. Now, his report would certainly not be admissible in evidence in this case, either as an expert or otherwise in controlling the judgment of this Court, and as he says himself, his position is one where he ought not to be compelled to testify in respect to a matter which he has already committed himself to. I do not mean anything disrespectful in the term, because I have a high respect for the Captain, but where his views have been already crystalized into the form of a report to a superior officer, he is certainly the last person who should be called here as an expert to advise the Court. I believe the Captain to be thoroughly qualified for his duties as Inspector of Hulls, and he has the respect and confidence of the community, and of all men who deal

with him. There is no doubt about that, but the method in which he is proposed to be used here, I think is not fair to the parties, nor fair to the Court, nor even fair to the Captain himself, and I object to it.

Mr. White—The objection made to the examination of Captain Talbot is not really in the nature of a legal objection, but is pointed to the good taste of myself in thus calling him as a witness.

Mr. Barnes—No.

Mr. White—That is a matter that I have to allow people to have their views concerning, whether it is counsel on the other side, or Captain Talbot himself. It is unpleasant for me to call Captain Talbot as a witness, but from his official position, and I will admit frankly, from the fact that the evidence was taken before him in this case, and that evidence is strong in favor of the "Oceanic," if not more so than the evidence that has been produced here before your Honor, it has led me to call him as a witness. The case is substantially the same.

Mr. Barnes—We do not think so.

Mr. White—That it was before him, while he was passing judgment then as a judge. I call him now as an expert in navigation, required to be expert, I think, as I understand it from his official position. He cannot get the position, as I understand it, without he is an expert. It is a mere matter of good taste whether I shall call him or some one else. The suggestion made by your Honor goes to an entirely different proposition, and one upon which it is not left for me to rule upon the question of the good taste in this matter. There is one ruling which I can make in this Court for myself. Upon the question of

the right to call expert witnesses, however, I desire to be heard, and I can produce to your Honor a long line of authorities. I have some seven or eight of them noted here that are referred to in the work called Rodgers on Expert Testimony, page 299, in which it is held, and I have found no decision to the contrary: "The opinion of persons engaged in the navigation of vessels are received on questions pertaining to nautical science. Such opinions have been received on the question of the possibility of avoiding a collision by the use of proper care on the part of one of the vessels, and as to the proper management of a ship, and whether on the evidence he was of the opinion that the collision could have been avoided by proper care on the part of defendant's servants, and whether a vessel on entering a harbor was skillfully handled." I cite:

Rodgers on Expert Testimony, 299;
Solz *vs.* Morris, 17 N. Y. Sup. Ct. 202;
Western Ins. Co. *vs.* Tobin, 32 Ohio St. 77;
Ginteman *vs.* Liverpool, etc., S. S. Co., 83 N. Y. 358;
Hill *vs.* Sturgeon, 28 Mo. 328;
Union Ins. Co. *vs.* Smith, 124 U. S. 405;
Fenwick *vs.* Bell, 1 C. & K. 312;
Ward *vs.* Salisbury, 12 Ill. 369.

Mr. Barnes—I wish to correct an impression that grows out of the counsel's infirmity rather than from anything I said. I did not assail either his good taste or his bad taste. I think it proper to observe I made no personal comment at all on the counsel calling the Captain as a witness. The point I make is this, that it is precisely as

though a case were pending in the Circuit Court, a portion of which had been tried before your Honor, and your Honor had come to a conclusion, and you should be called as an expert witness in the Circuit Court to testify to what your conclusions were on a case tried in this Court. Now this gentleman is not here in the capacity of an expert witness at all. He says he proposes to propound a hypothetical question to him. What is the object of that? It is to call some man disinterested, unprejudiced without conclusion already arrived at in his mind, to state to him a condition of facts involved in the case in hand, for the purpose of obtaining his opinion upon a given point which may aid the Court in coming to a conclusion. Now, I submit it is not fair. It is not right that a gentleman in the position of the Captain, who has already sat as a Judge appointed to decide a proposition under the law, and who has already decided it, should be called as an expert witness to state the conclusions at which he arrived in a given case for the purpose of aiding this Court in coming to a judgment. That is not the object and function of what I understand to be an expert witness, and he ought not to be called. I am not talking about the question of taste. He ought not to be permitted to be examined as a witness in respect to a matter concerning which he has already acted as a Judge. That is the proposition.

Mr. White—Your Honor may not quite understand the situation. Captains Talbot and Hinman did not sit as judges in this matter, so far as concerns the conduct of the "Oceanic." They expressly disclaim having any jurisdiction whatever over the "Oceanic" or her master or her pilot. They were investigating the question

to determine whether or not Captain Wallace of the "Chester" and the management of the "Chester" was negligent, and what they learned regarding the "Oceanic" was necessarily learned by them in the examination in the taking of the testimony, but it was not a matter on which they were acting judicially, because, as I say, they disclaimed having any jurisdiction over the "Oceanic" or her master or her pilot, and did not in fact have any jurisdiction over them; so that Captain Talbot has not acted as a Judge passing upon the conduct of the "Oceanic." Now, this case in the 124th U. S., the case of the Union Insurance Company *vs.* Smith, found at page 405, is as follows; I read from the syllabus: "Expert testimony as to whether, under the circumstances, it was the exercise of good seamanship and prudence to attempt to have the vessel towed to Cleveland was competent." The Court says but little on that point, and I will read it. It is found on page 423, "It is also objected that the testimony given by the five witnesses above mentioned was not the proper subject of expert testimony; that under the policy in this case the proper inquiry was not as to the prudence of the captain in passing Port Huron, ; and that if the vessel was, as a matter of tact, unseaworthy, either because of her rottenness or her unnavigability, or the broken and leaky condition of her stern, and if the loss was occasioned by unseaworthiness, the defendant was not liable. But we think that the testimony referred to was competent, in view of the questions the jury were to consider, as properly laid before them by the Court in its charge, to be considered hereafter." I will see if I can find the exact question that was asked these witnesses. Q. The plaintiff himself,

as a witness, was asked whether, on the facts of the ease, detailed to him in the question, it was the exercise of good seamanship and prudence when the vessel reached Port Huron to continue right on, to bring her to her home port of Cleveland. He answered that he would consider it good seamanship. The calling or profession of navigating ships is one that is peculiar. The knowledge of how to navigate ships and what ought to be done is not one that is known to men in every day life. It is not one that the Court would take notice of or the jury take notice of in their own knowledge. It is a high calling, requiring as long a time to serve in order to master all the different intricacies of it as the profession of medicine or law, and much longer than that of the ministry. It is something that a farmer or merchant or a physician, or other person in the ordinary avocations of life on shore might know little or nothing about. Without being egotistical at all, I say that I know something about the ordinary forms of procedure in the Courts of the State of California, and legal decisions, and I have picked up a good deal of outside information that is useful to me, but the way I have stumbled along through this trial, after attempting to post myself in order to be prepared for it, shows that a person on shore who has never had opportunities to obtain information of nautical matters, necessarily can be much assisted in having the opinions of experts, and I take it, it would be very much the same with a Judge on the Bench as it would be with the average attorney, except that the Judges are men of selection from the body of the Bar. If your Honor is of the opinion that you are fully advised in regard to the rules and laws of navigation, so that witnesses would not give

you any information except that which would be a repetition of what your Honor already possesses, there is no necessity on our part to call expert witnesses.

The Court—The Court will not make a ruling on that hypothesis. The Court may not know the rules or the laws governing navigation, but before a case is decided the Court must try to know. Before this case would be decided, it would be incumbent on the Court to be thoroughly informed as far as possible of the rules and regulations governing navigation as they are in the law and provided by the regulations.

Mr. White—I do not ask the witness to post your Honor as to the rules of navigation, but to give his opinion on certain conditions of fact whether those rules apply.

The Court—You apparently avoid the difficulty that was mentioned by the Supreme Court in the case of the "Charles Morgan," with which you are doubtless familiar. In that case the offer was to introduce the opinion of the Board of Inspectors who had investigated the collision. You avoid that by now proposing to submit him to a hypothetical question, but still behind it all rests the objection that the Supreme Court made to the testimony in that case. In that case the finding of the Board of Local Inspectors was properly excluded, says the Supreme Court. "The proceeding in which the finding was made was instituted under Rev. Stat., Sec. 4450, for an investigation of the facts connected with the collision so far as they had a bearing on the conduct of the licensed officers on board the boats, and at most it only showed the opinion of the board upon the subject from the evidence adduced before them." That

would be substantially the result that we would arrive at in this case. You may say you avoid that by presenting a hypothetical question, and at most all you will get from this officer is an opinion. That is what was objected to in that case. The Supreme Court says: "It was offered, to use the language of counsel, as tending to affect the evidence offered by the libellants to show that the Cotton Valley was in her proper position in the river, and had proper watches and lights set at the time of the collision. Clearly it was not admissible for any such purpose." I am aware there is a line dividing expert testimony from the testimony of an officer of the character that this witness appears to be, and you are endeavoring to avoid that complication. I suppose you are familiar with the case of the "Morgan"?

Mr. White—No sir; but that proposition is perfectly plain to me as your Honor reads it from the opinion.

The Court—As suggested by General Barnes, it would not be proper to the Circuit Court to call upon the Judge of this Court, or for this Court to call upon Judge Ross. In the same way you might call Judge Ross, who has investigated collision cases and is familiar with the law, or should be, and ask him to come into this Court and give his testimony as to what in his judgment was the law which would govern a case of that kind. That would be taking away from this Court a responsibility which it must accept and must discharge. This Court must determine, whether rightfully or wrongfully in the judgment of the Court, the law that governs such matters, and the regulations, and it will be improper for this Court to have Judge Ross, if in town, placed upon the stand. Suppose, after

you get through, General Barnes should call Judge Ross and recite to him the evidence up to this moment, and ask him if on that state of facts any one of these persons were at fault. While you might not be able to state distinctly the rule that would exclude him, it would appear to every lawyer that that was wrong. These inspectors have a duty to perform under the law, under which they have just as much obligation as this Court in discharging its duty. The Supreme Court has excluded the opinion of these officers. Is not that what you are trying to do now, to get the opinion of this officer?

Mr. White—Not necessarily. I say that my view of this testimony is that it is substantially the same as was produced before these Inspectors, but General Barnes may take an entirely different view of that, and your Honor may take an entirely different view of that. Without going into the question or looking at all into the question of what was produced there, your Honor may take a certain view of this testimony that is not in harmony at all with the view they took of it. It is open to General Barnes to cross-examine my witness, and to put such hypothetical questions based on what he contends are the facts proven at this trial as he sees fit to. I expressly disclaim having any right to pick up the copy of their decision and introduce it in evidence. I know I have no such right as that. If I offered such a thing, and your Honor was willing to admit it in evidence, and the other side objected, I would promptly withdraw it, because I know that that would be error in the case, but it seems to me this case is more like it would be if Judge Ross was callen before your Honor to testify in regard to some

foreign law with which he was familiar, to prove the existence of that foreign law, and what it was, by calling a witness that had knowledge of that law. These Inspectors tried no case against the "Oceanic;" they tried no case against Captain Metcalfe or Pilot Meyer, and did not have jurisdiction of them. All that they obtained relative to them was obtained by them incidentally in trying the "Chester" and Captain Wallace, and while it may not be good taste, did the fact that they investigated that question disqualify this expert from being a witness? If it did, I know of no rule under the statute, nor in any decision, because my contention is that the decision your Honor has read has no application whatever. They did not call the witness. I know of no statute or decision which disqualifies an expert because he has obtained some knowledge of the facts, from testifying. It is within the province of the other side so to frame their questions or to obtain a direction from your Honor that this witness in testifying shall leave out altogether all testimony all consideration of what he heard in the examination of witnesses before him in regard to this matter, and leave out of consideration altogether the judgment that he then exercised. The question is, Has this witness disqualified himself by reason of his official position? I contend he has not, and there is no rule of law, either statutory or by decision of the Court, that disqualifies him, because he has already made some examination of these facts, perhaps made an *ex parte* examination of them, so that questions put to him based on the real facts in this case as they have developed at this trial, may produce an entirely different answer from him than would accord at all with the judgment he

expressed in passing on the question whether the "Chester" and Captain Wallace were guilty of negligence. I expressly disclaim having any intention of introducing directly or indirectly the judgment that Captain Talbot, in connection with his brother inspector, rendered upon the trial of the hearing of Captain Wallace.

Mr. Barnes—I do not desire to take up any more time in discussing this question than is essential, but it seems to me that the counsel has not met the question at all. Here is a public officer, who under a section of the Revised Statutes of the United States, which I call your Honor's attention to, is made a Judge. He acts. On such lights as he has, he makes a report. I do not desire to accuse the counsel of misrepresenting intentionally what these gentlemen did in that report, but he has made a mistake. They did make a finding, both as respect the "Oceanic," both as respect the pilot and master of the "Oceanic." What that was, either as respects them, or the ship or Captain Wallace, it is not material now to inquire. He disclaims any intention, but whether he does or not, they belong to the class of intentions that are not entitled to very much respect. He calls this gentleman, an expert witness, to get from him an opinion which he presumably has not changed in a case which he has already tried. In other words, he says he knows that the Supreme Court of the United States has decided that the former report and conclusion and evidence taken by them is totally inadmissible, and for the very best of reasons. He, in effect—of course, I concede his perfect innocence; I concede he is as pure as snow in his purposes, but he will accomplish his hellish purpose all the

same if he is permitted, instead of offering this document signed by Captain Talbot and Hinman, to put those judges on the stand to ask them their conclusion and to advise this Court as an expert witness. That such a thing as that is possible, in view of the law and the common sense of the thing if there were no law about it, must strike every reasonably intelligent person with a sense of its utter and complete unfitness in a tribunal such as this.

Mr. White—This is an important question, and I desire to present such lights as I can to your Honor, especially in view of the intimation your Honor has given me.

The Court—I think, Mr. White, there are one or two other decisions that I have not got here, one of the case of the "Utah." I think it would be a saving of time by your withdrawing this witness and putting some other witness on the stand until I have had an opportunity of consulting one or two of the authorities. I think the question has been really determined by one of the courts.

CLITUS BARBOUR. Called for the plaintiffs. Sworn.

Mr. White—You are an attorney at law in the city?

A. Yes, sir.

Q. You were on board the "City of Chester" at the time of her collision with the "Oceanic" some five years ago?

A. Yes, sir.

Q. Go on and state everything that came to your sight and hearing on that occasion.

A. As near as I remember, it was about 10 o'clock in the morning. I was about midships, I believe is the nautical phrase. I think I had a newspaper, either that or I

had been speaking to a couple of old tourists, who asked me some questions about points of interest on the bay, when I heard a furious racket on the boat, whistling

Q. Which side of the steamer were you on ?

A. I was on the left side, to the larboard side I suppose you would call it. I looked up and I saw apparently across the way, or across the bows, of the steamer I was on, the "Chester," a large steamship probably a couple of hundred yards away. The next I knew, we crushed into it. There was a dull thud, a bump, reminding me somewhat of the bumps that the ferry boats have when they strike the piers. The next thing I noticed was a lot of people swarming over into the big steamer, the "Oceanic," from our steamer, and I think they were the crew. I went forward then to where they were, and I saw a big gash cut into the "Chester," some 8 or 10 feet, I should think, and the people were going over the bow.

Q. The bow of the "Oceanic ?"

A. Yes, sir. The "Chester" was sinking slowly all the time. When it got down to about, I should think, 10 feet, it was up to the top of the "Oceanic"—the "Oceanic" was anyway some 3 or 4 feet higher. When it got sunk down about 10 feet I concluded it was no use trying to go over there. I started back. I was going to get my life preserver. I noticed one in the room I had. I heard someone on the bridge above sing out, "put down the boats." I thought it was a very pious idea. In fact, I think the idea ought to be given at first to put everything down that is afloat. I could not find a life preserver, so I went and helped to get the boat down, which we did, and I got into it finally and was taken upon the "Oce-

anic." I went off afterwards by the Custom House boat, and by that means got to land again.

Q. Take these two models and describe the position of the two ships when they struck together?

A. They were not crossways exactly. The big ship was coming down in this way. Supposing this is the channel out here. Our boat was in about that position, I think; not a quarter angle exactly but nearly. It appeared to me as if our boat was trying to run round the end of them and missed it and struck.

Q. At what rate of speed did the other steamer appear to be coming towards you ;

A. Under a very slow headway, as near as I can remember. I was looking closely at it, too; I did not think of any collision.

Q. You say you saw them about 200 yards apart?

A. I should think they were about that.

Q. What was the weather, so far as the fog or otherwise?

A. When we started off from the city here it was what you call a cloudy morning. On the bay there was some sort of a fog—a sort of a rising, falling fog.

Q. A drifting fog ?

A. Yes, sir ; it was not so bad but what I could see easily the shore.

Q. What shore?

A. I was upon the San Francisco side. I did not notice the other. I saw the shore. I was pointing out to this old couple, I remember, the seawall, Black Point, the Presidio and some other things of that sort that they were inquiring about, which I could see at that time of

the morning. Whatever fog there was, was out beyond.

Q. About where did this collision occur?

A. I could not tell you exactly. All I know is, we must have drifted somewhat down, because at the time I got into the little boat, we were nearly opposite the Presidio. I think, though, it was nearly off Fort Point where the collision occurred. We must have drifted some distance down, because our little boat from when we put it down was within 50 yards of the "Oceanic," and it drifted away so that we had to paddle before we got our oars up and got started probably a couple of hundred yards. We drifted down that distance in our little boat.

Q. You say that you pointed out to this old couple the Presidio?

A. Yes, sir.

Q. How far off from the Presidio were you?

A. I think about half a mile. Your eye is deceived sometimes by looking over a level space, especially anything that is very high.

Q. Was that the last point that you pointed out to them, or do you remember?

A. I think it was.

Q. How well were you able to see that south shore?

A. Well enough to see the buildings, to see the wharf they have there; well enough to remark to some people as I got into the boat that I thought if I was a young man I would have been able to swim it without any trouble.

Q. As I understand, you did not look towards the north shore at all?

A. Not until I got on board the "Oceanic;" yes, I saw it too, afterwards. When the "Chester" went down

we were upon the opposite side from where most of the people had got down. We were at the left-hand side, the inside. There was only one other boat on the side I was, and not many people. None were lost on that side. When the "Chester" went down it left very little ripple of any kind, and we could look right across over a clear surface. My own notion was—it is somewhat confused in my mind, but it appeared to me further to the Saucelito shore than it was to this shore.

Q. It appeared to be further to the Saucelito shore?

A. Yes, sir.

Q. That was the time that the "Chester" went out of sight, and you looked from the boat that you were in that had been on the left-hand side, across over where the "Chester" had been?

A. Yes, sir; there was nothing there at all except these boats.

The Court—You were on the San Francisco side of the wreck?

A. Yes, sir.

Q. How far from the "Chester"?

A. We were right there where it went down; I suppose two or three rods away. I know I sprang off, and I had to swim may be a rod in my clothes to get to my boat. It raised up and pitched headforemost without any suck, or whatever they call it; any swell that was made. Immediately the surface was covered with a lot of furniture and stuff of that kind. There was an explosion just as we went off the "Chester" on board the "Chester," produced probably by the compressed heated air and the water around it. It was said that it had blown open the staterooms and

caused this furniture to be on the surface. We were there some time in the little boat before we started to row to the "Oceanic," and I was looking and the rest of us were looking to see if we could help any one or be of any service. We were fifty yards or more away from where these people were. They had gone off on the other side.

Mr. White—Q. Did you notice at all what was done on the "Oceanic"?

A. No, sir, I could not. I paid very little attention to what was going on.

Mr. Barnes—No questions.

Mrs. SARAH NYE. Called for the plaintiffs. Sworn.

Mr. White—Q. Where do you live?

A. Sacramento.

Q. You are a sister of the plaintiff here, Mrs. Elizabeth Smith?

A. Yes, sir.

Q. Were you with her and her family on August 22nd, 1888, when the collision occurred between the "Chester" and the "Oceanic"?

A. Yes, sir.

Q. Were you on the "City of Chester"?

A. Yes, sir.

Q. Go on and state, Mrs. Nye, all the facts about the collision.

A. We were all on the steamer and were looking at the San Francisco side and the scenery, it was so nice and clear. We were on top, looking around, and my brother-in-law says, "There is a steamer coming." My sister and I looked to see it. We could see it quite a distance off.

We heard it whistle. Before we saw it we heard the whistle. That is what attracted our attention. We watched the steamer until it came in sight, until it came close, very close, to us. I asked my brother-in-law—

Mr. Barnes—Q. Never mind what you said to your brother-in-law. Leave that out, please.

Mr. White—Q. Do not tell about the talk. Just tell what you saw and what happened.

A. The steamer came very close and my sister says—

Mr. Barnes—Never mind what your sister said.

The Court—Q. State what you did without repeating conversations.

A. I stood there at the rail, with my hand on the railing, looking at the steamer until it came very close, close enough that it did not seem to me like more than a half-block distance. I stepped back and it collided. I could see that they were going to come together and I stepped back, because I was very close to where it was going to collide. I stepped back a distance of about four or five steps when it struck. As soon as it struck I ran back and climbed over. I think I was one of the first one off after it collided.

The Court—On to the "Oceanic"?

A. I caught the rail of the other steamer on the broken rail of the "Chester." I pulled myself up, with a little assistance from above, on the "Oceanic." They helped me up. Then I was pushed back so that I fell down in a hole there among a lot of freight. When I picked myself up and got out of there I just could see the last of the steamer going down. It looked to me like an explosion. The water flew up. That was the last I saw of it until I saw my little nephew in the water, and I told my sister there

was the little boy. We could not see my brother-in-law or the little girl. He had a red coat on, and that was the way I could tell him.

Mr. Barnes—Q. Who picked the little boy up?

A. A Chinaman had the little boy.

Q. A Chinaman jumped overboard from the "Oceanic"?

A. Yes, sir; and held him by the foot when I saw him. He looked to me as if he had him by the foot.

Mr. White—Q. Did you see Mr. Smith after you got on board the "Oceanic"?

A. Yes, sir; I was with him to the very moment of the collision.

Q. After you got on board the "Oceanic," did you see him?

A. No, sir; I never saw him after I left the "City of Chester."

Q. How was the weather that morning, foggy or otherwise?

A. It was just as clear as it is to-day; a beautiful morning, except that there was a very thick fog at times; a little sheet of fog, then cleared off and was bright, and then a little fog again, but very little.

Q. Where were you on the vessel, which side of it, as you were going out, before the collision occurred?

A. I was on the left hand side as we were going out.

Q. Could you see the land on that side?

A. Yes, sir; I could see all the small boats along the edge of the water.

Q. How far were you from the land, or could you tell?

A. I could not tell, but I was not very far, because I could see all the small boats and see the people in them.

It could not have been more than, I think, half a mile. It could not have been that distance, I think.

Q. At the time when you first saw the big steamship, which was nearer to you, the land or the steamer?

A. The land.

Q. The land was nearer?

A. Yes, sir; much nearer. It seemed to be much nearer. It did not seem to me like more than two-thirds of the distance.

Q. Which land do you mean?

A. The land on the left hand side.

Q. Did you see the land on the other side?

A. I had seen it just before, but not at the time of the collision.

Q. At the time that you saw the land on the other side, which land appeared to be nearest to your ship?

A. The land on the left hand side.

Q. Was nearest to you?

A. Yes, sir.

Mr. Barnes--No questions.

The Court—Mr. White, what do you propose to prove by Captain Talbot?

Mr. White—To put a hypothetical question to him based upon the testimony introduced, and to ask him this question, based on the hypothetical question whether or not the management of the "Oceanic" was proper and whether or not there was, in his opinion, any violation of any of the rules of navigation, and whether or not, under those circumstances, any other thing could have and ought to have been done on the part of the "Oceanic" that would have prevented or tended to prevent the disaster.

The Court—In the case of the "Gratitude" *vs.* the "Utah," in the 14th Federal Reporter, page 479, which was a case of collision, the Court considered this question of the testimony of inspectors, and in that case, as in the case in the Supreme Court, it rejected the report of the inspectors. At the same time, the Court made this observation: "It is proper to say that no weight whatever has been attached to the action of the inspectors, whose report was put in evidence and referred to on the argument. The rights of parties injured by collision cannot be affected by anything these gentleman may do in the discharge of their official duties. They may be called as experts to solve nautical problems, if competent for this service; in no other way can the Court listen to what they may do or say respecting cases of collision." As I desire to avoid any question of error in this matter, I think I would be justified in following that rule and admit this testimony, so far as it may relate to a nautical question. With that limitation, you may call Captain Talbot.

Mr. Barnes—I made the additional point, which was perhaps not worthy of respect, that, so far as the navigation and handling of a steamship under the circumstances of this one, it is all provided by law. The regulations to take the place of the opinion of anyone on this subject, and the question is, whether these vessels did obey the law, whatever it was.

The Court—The Court will disregard this testimony if it intrenches in the least on the duty the Court has to perform. In regard to that your objection is sustained, but it is qualified as the Court in the case I have cited qualifies it. The Court will not permit the witness to testify

as to any proposition concerning laws and regulations concerning which the Court must decide.

Mr. White—I am willing to call no experts on either side, and stand by the rules, whatever they are.

Mr. Barnes—I am satisfied with that. I have no doubt that I could call a whole naval batallion to sustain Captain Metcalfe and the officers of the "Oceanic," but I do not think it has any part in this case.

Mr. White—We will agree that no experts shall be called, and your Honor will have to struggle along without that assistance.

The Court—That is one of the difficulties pertaining to my position.

S. M. Marks. Called for plaintiffs. Sworn.

Mr. White—Q What is your business?

A. I am an insurance secretary.

Q. What company.

A. The Pacific Mutual Life Insurance Company.

Q. How long have you been in the life insurance business?

A. 20 years.

Q. Are you familiar with the tables showing the expectancy of life?

A. Yes, sir.

Q. What according to the American Mortality Table would be the expectancy of life of a man in good health and 32 years of age? You may make use of your books and tables to help give that information?

A. Age 32. 33 years and 9-10 of a year, according to the American Table of Mortality.

Q. Can you tell what amount of money in spot cash would be required to purchase an annuity on such a life of $1,500.

A. An annuity of $1,500 payable annually during the life of a party aged 32, would cost in cash $24,882.

Q. Perhaps it would be of more assistance to the Judge if you could tell how much money in cash is required to purchase each dollar of the annuity?

Mr. Barnes—That is simply a question multiplication; I am satisfied with his statement.

Mr. White—Then strike out that question. The Judge can find that out by dividing $24,882 by $1,500.

That is our case.

GEORGE TAYLOR TILLSTON. Called for the defendant. Sworn.

Mr. Barnes—Q. You are a mariner by profession?

A. Yes, sir.

Q. You were the first officer of the Occidental and Oriental Company's steamship "Oceanic" on the 22nd of August, 1888?

A. Yes, sir,

Q. At that time how long had you been going to sea?

A. Twenty years.

Q. Do you hold a certificate?

A. I hold an English master's certificate.

Q. At the time of the collision between the "Oceanic" and the "City of Chester?" how long had you been first officer of the "Oceanic"?

A. About two years.

Q. Had you been occupied while in her in making a

voyage from San Francisco to Japan, China and return?

A. Yes, sir.

Q. How long does one of those voyages take out from the port of San Francisco to get back here?

A. Usually about two months.

Q. On the morning of the 22nd of August we understand that the steamship "Oceanic" was coming into this port from sea?

Q. I call your attention to the bromide print of the "Oceanic" on exhibition here, and ask you what time you went on duty that morning, and to show the Court with the pointer where your duty called you and where you were.

A. I went on duty on the bridge at 4 o'clock.

Mr. White—As to the position these officers had on that ship I make no contention. The first, second and third were in the positions as mentioned by General Barnes in his opening statement. Captain, pilot, first, second and third officers, and fourth, if there was any, were in their positions.

Mr. Barnes—Q. Just state where you were.

A. I took charge of the bridge at 4 in the morning. We proceeded under easy steam towards the pilot ground. After receiving the pilot I went on my usual station coming in or going out of port, and stood forward, right here (pointing).

Q. On the whaleback?

A On the whaleback.

Q. How many men did you have with you there?

A. I had about ten sailors and the carpenter. My

duty kept me there from the time the pilot has to come on board until the ship safely arrived in port.

Q. Where did you pick up the pilot?

A. Close to the whistling buoy. I heard it but did not see it.

Q. Louis Meyer was the pilot that came aboard?

A. Yes, sir.

Q. And he went on the bridge?

A. He went on the bridge.

Q. And took command of the ship as pilots do coming into port.?

A. Yes, sir, along with the Captain.

Q. From the time that the pilot came on board, in the neighborhood of the whistling buoy, what was the speed of the "Oceanic"?

A. I should imagine from where I stood that some time she was going very slow; at other times half-speed, just as the fog lifted or shut down thick.

Mr. White—I object to this as not being the best evidence. I understand there is an engineer's log kept, or ought to be kept. I understand from something that was said by someone that there was a record kept in the engineer's room of this vessel. I do not know whether it is required by law to be kept; I presume it is. Whether or not, it does appear that there was such a log kept; and this log ought to be the best evidence to show the speed of the vessel at different times.

The Court—Is there such a log?

Mr. Barnes—Q. Did you keep any log of the speed of the ship?

A. I did not.

Mr. Barnes—I called this witness for what he saw, and perhaps when I call the chief engineer of the "Oceanic" he may be able to tell what he did. I am calling this witness as any other witness would be called to testify to what occurred.

The Court—Proceed.

Mr. Barnes—Q. What was the speed of the "Oceanic" after she took the pilot generally? How did she come in?

A. Certainly not at not more than half speed, and several times going slow and dead slow.

Q. Which side of the entrance to the harbor did you come in, the north or the south side?

A. The north side.

Q. What land, if any, did you see after you came to the mouth of the harbor from your point of lookout on the bow?

A. I heard Point Bonita fog whistle, but did not see the land, and I saw the loom of Point Diablo low down on the water.

Q. Between Bonita Point and Point Diablo, what was the speed of the ship with reference to going at full speed, or half speed, or slow, or dead slow.?

A. Dead slow.

Q. What was the state of the weather?

A. The fog had been pretty thick outside, but as we approached the entrance to the harbor it was clearing away.

Q. How far could you see in the fog? State the limit of distance, and the shortest distance as well—that is, if you could see two miles at any time, and if it was between

that and down to half a mile? State it how it was.

A. At what particular time?

Q. As you came in from Point Bonita past Point Diablo.

A. Before we got to Point Bonita, I should say we could see fully quarter of a mile, as we passed a big sailing ship lying at anchor. As we got inside from Point Bonita it cleared away, and I imagine I could see half a mile; and so it continued up to the time of the collision.

Q. Will you go on and state to the Court all you know of the doings of the "Oceanic" and the "Chester" from the time of passing Point Diablo, when your ship was going dead slow?

A. Shortly after passing Point Diablo I distinctly heard a steamer's signal fog whistle two or three times. That particularly drew my attention in that direction.

Q. What direction did that seem to come from?

A. About two points on the starboard bow.

Q. Two points on your starboard bow?

A. Yes, sir.

Q. You heard the fog whistle of a ship?

A. Yes, sir.

Q. Could you then see it?

A. No, sir.

Q. What signal, if any, was being given from the "Oceanic?"

A. The usual one-blast fog whistle.

Q. What then occurred?

A. I reported the signal whistle by bell to the bridge, which was answered. I then kept my eyes in the direction of the sound, and shortly after I saw a black object

issuing through the fog about two and a half to three points on the starboard bow.

Q. How far away?

A. From 600 to 800 yards. Directly I saw the ship coming through the fog I reported it to the bridge and got the answer all right. At the same instant two blasts were blown on the "Oceanic," and I heard the order given to put the helm to starboard; at the same time this other steamer answered with two blasts. I then turned my face away, thinking no more about it, because I felt confident everything would be all right, as I had some men working there.

Q. From the position in which these ships were at the time when the two blasts were first given by the "Oceanic" and answered by the "Chester," the "Oceanic" starboarding her helm and sending the ship to the left, if the "Chester" had then starboarded her helm and gone to the left, was there any danger whatever of collision between those vessels?

A. None whatever.

Q. What was the next thing that occurred?

A. She still seemed to approach in the same direction, when I again heard the whistle of the "Oceanic" blow two blasts, which was answered by the "Chester."

Q. Now then, if at that time, when the "Chester" answered the two blasts of the "Oceanic," she had minded her helm and gone to starboard, was there then any danger of collision between the two?

A. No, sir; I think she would have cleared.

Q. What happened?

A. She came in the same direction. It seeme to me as if the helm had been put to port.

Q. Why did it seem to you that the helm was to port?

A. Because he had given two blasts of the whistle, and starboarding his helm meant for him to go to the left.

Q. Which way was he going, to the left or to the right?

A. He was evidently steering to the right, keeping on that way. He kept approaching in that direction, and the ships were getting pretty near and I saw that a collision was inevitable. I told my men to stand back.

Q. Wait a moment. After the second two blasts were given, was any change made in the motive power of the "Oceanic?"

A. No, sir; not up to that time.

Q. When was any change made in her movement with reference to going astern. That is what I want to get at.

A. After the second two blasts were given and did not appear to be responded to by the approaching steamer.

Q. The blasts were responded to. were they not.

A. But the course of the ship did not correspond with the signal given.

Q. Then what did they do on the "Oceanic"?

A. I then felt excessive vibration, which I concluded at once was the cause of the engines being put full speed astern. Directly after that the ship collided, the bow of the "Chester" coming across the "Oceanic's" stem in that direction (illustrating). Immediately afterwards there was a great rush over the bow, and the first people, I should judge, was the crew of the "City of Chester." There was the usual panic, men and women scrambling and shouting. By this time a great number of people had

got on the "Oceanic." The ship then commenced to settle down forwards. By that time we had four boats down alongside the "Chester," all around the "Chester." She then took one plunge and disappeared, and I still saw there were a few passengers left on the deck. Our boats were busily engaged then in rescuing the struggling people in the water.

Q. What boats, if any, did the "Chester" have out?

A. I saw one boat was floated just as the ship disappeared.

Q. How many boats did you say you had out there?

A. We had four boats down before the ship sunk, and one boat directly after she disappeared; five boats in all.

Q. As you passed Point Diablo, can you give the Court any idea of what the distance from the "Oceanic" to Point Diablo was?

A. I should imagine from the state of the fog that it would be a quarter of a mile.

CROSS-EXAMINATION.

Mr. White—Q. After the first signal was given by the "Oceanic" and answered by the "Chester," you turned away to some other duty, did you?

A. I turned my face away from the ship.

Q. What was it that you were doing?

A. Just simply looking to see that the anchor was all ready.

Q. Preparing to cast the anchor when you got into port?

A. Yes, sir.

Q. How long was it after that before your attention was again called to the "Chester"?

A. Probably not more than half a minute.

Q. After the time that you first saw the "Chester" what appeared to be her position towards the "Oceanic"?

A. She was coming at an angle of about two and a half to three points on the starboard bow.

Q. What direction was the "Chester" taking, or could you tell?

A. She was taking the direction to come in two and a half points from ahead of the "Oceanic."

Q. Was she coming towards the "Oceanic"?

A. She was standing over towards the "Oceanic," crossing ships.

Q. If it had been night what lights could you have seen on the "Chester"?

A. We probably would have seen all three lights.

Q. That is, a white light and both the red and green lights?

A. Yes, sir.

Q. In other words, the "Chester" was coming head on towards the "Oceanic"?

Mr. Barnes—That does not follow.

A. No, sir; end on means two ships meeting directly opposite to each other. She was not doing that.

Mr. White—Q. You do not understand me. I do not mean that the two ships were end on.

Mr. Barnes—Then do not say so.

A. End on, in the rule of the road, means two ships coming directly opposite, so that each ship can see the three lights of the other one.

Mr. White—Q. Was the "Chester" coming so that in the position she stood her masts and funnel were practically in line from where you were?

A. I should judge so.

Q. Then she was end on, or practically so, towards the "Oceanic"?

A. I do not understand that term, "end on." "End on," in nautical phrase, means two ships approaching so they can see the mass of the lights in a line with each other. That is the only term I understand by end on.

Q. I understand it the same way. How much may one vessel vary from the one side to the other, how many points, and the other vessel be enabled to see three of her lights?

A. She has got to change her course very little before she shuts in one light and opens the other whichever way she opens the helm.

Q. How many points, do you know?

A. Half a point at least.

Q. No more than that?

A. Not more.

Q. I will not pursue that any further. At the second time that your attention was called to the "Chester," had her position changed any, her direction from the "Oceanic"?

A. Apparently not.

Q. Were the vessels any nearer together?

A. Considerably nearer.

Q. But her apparent direction from the "Oceanic" was substantially what it was at the first signal?

A. I should imagine so.

Q. Were her masts and funnel then in line, or practically so, towards the "Oceanic"?

A. That I could not be sure of.

Q. What I want to know is, was there anything in the way in which the "Chester" approached that indicated that she was turning towards the "Oceanic" between the first and the second signals?

A. No, sir; I think she was coming in the same direction.

Q. Between the first and second signals did it appear to you that the distance between the "Oceanic" and the "Chester" had broadened?

A. Betwen the first and second signals?

Q. Yes.

A. Had broadened?

Q. Yes.

A. No, sir.

Q. If it had been night, could you have seen all three lights of the "Chester" at the time of the second signal?

A. I think I could

Q. That indicated then that she was still coming apparently directly towards the "Oceanic" at the time of the second signal?

A. Yes, sir.

Q. As the ships had come nearer together, what had been done by the "Chester" between the first and the second signals indicated that she had turned towards the "Oceanic" during that time, did it not?

A. I should say not. It was so very short a time. I never imagined there was going to be a collision. I turned my face away, thinking everything was all right. It was

such a short time when I turned round and saw she apparently was coming in the same direction that I felt any uneasiness about it.

Q. Were you busy during the first and second signals?

A. My business was to keep a strict lookout.

Q. The second signal was sounded without your reporting back from the bow of the "Oceanic" that the "Chester" was coming on you?

A. The second signal was blown, did you say?

Q. Yes.

A. I had reported the ship previously.

Q. You had reported it at the first signal?

A. Yes, sir.

Q. Your attention was called away to some duty of getting out the anchor, and as I understand you the second signal came from you without your reporting anything concerning the course of the "Chester"?

A. I heard the second signal. I had nothing to do with that I simply reported the ship and left it to the master and pilot to do as their judgment told them.

Q. You made no report from the bow, then, to the bridge between the first and the second signals;

A. No, sir.

Q. State again what occurred immediately after the second signal.

A. Immediately after the second signal, when the collision was likely to take place, I felt by the vibration of the "Oceanic" that her engines had been put full speed astern.

Q. After the second signal was sounded, did you make any report from the bow of the bridge?

A. No, sir.

Q. What was it that you say about after the second signal was sounded, and seeing that the "Chester" did not go to starboard that the vessel went full speed astern—what do you say about that?

A. I say that a collision was likely to take place, and in my opinion it was the only way to try and avoid it by going full speed astern.

Q. Commence with your narrative of this matter at the time the second signal was sounded, and give it to us up to the time of the collision.

A. After the second signal was sounded?

Q. At the time of the second signal up to the collision.

A. The "City of Chester" apparently was coming along in the same direction, not having answered her starboard helm, as she had signified. I then saw that unless something took place that a collision would be likely to happen. Just at that time the engines of the "Oceanic" were put astern.

Q. Just at what time?

A. A short time after the second blast was given; a sufficient time to allow them to act upon that.

Q. How long a time was that?

A. I could not state the time, but sufficient for ships to answer.

Q. Was there long enough elapsed from the time of the sounding of the second signal up to the time of the engines going full speed astern to notice whether or not the "Chester" was obeying that second signal?

A. There was ample time to notice whether she was obeying it. I understood you asked me, was there time for me to see that she had answered.

The Court—Q. Time for you to observe that she did not obey her helm?

A. Yes, sir.

Mr. White—Q. I do not know as you understand the question. I want to know whether, between the time that the second signal was sounded and answered and the time that the "Oceanic's" engines went full speed astern, was there time to see whether the "Chester" obeyed that signal and went to starboard?

A. Yes, sir.

Q. Then, when it was seen that she did not obey the signal and go to starboard, the engines of the "Oceanic" went full speed astern?

A. Yes, sir.

Q. At the time of the collision you were stationed exactly on the bow of the "Oceanic," were you?

A. No, sir; just before the collision took place I moved aft about this far (pointing).

Q. About to the foremast?

A. Yes, sir.

Q. And on the starboard side?

A. Yes, sir; directly the ships collided, I ran back from here (pointing).

Q. Why did you move back seventy-five or a hundred feet from the bow of the "Oceanic" at that time?

A. Because I saw the "Chester" was evidently trying to get across the bows, and probably would make a miss of it, and it was a very risky position to be in.

Q. That is, it was risky to your safety or to anyone's safety to be on the bow of the "Oceanic"?

A. Yes, sir.

Q. You and the men with you ran back to avoid that danger?

A. Yes, sir; to about here (pointing).

Q. You remained about seventy-five to a hundred feet from the bow of the "Oceanic" until the collision actually occurred?

A. Until the ships just met.

Q. Then what did you do?

A. We went back and took the people in and threw ropes over.

Q. You stood on the bow of the "Oceanic" and helped the people up from the "Chester"?

A. Yes, sir.

Q. How long did you remain there?

A. I remained there for several minutes. The pilot came along at that instant to find out what was best to be done. I remained there for several minutes and went to see then that the boats were away.

Q. During the time you were there, there was a struggle going on among the people of the "Chester" to see who could get up?

A. Very great.

Q. A panic among the people of the "Chester"?

A. Yes, sir.

Q. How far back from the bow of the "Chester" did the "Oceanic" strike her?

A. I should judge thirty feet.

Q. How far did the stem of the "Oceanic" cut into her?

A. Not very far. The concussion was very slight indeed.

Q. Where are you employed now ?

A. I am employed on the Occidental & Oriental steamship " Belgic."

(An adjournment was here taken until 2 o'clock P. M.)

AFTERNOON SESSION.

T. P. H. Whitelaw. Called for the defendants. Sworn.

Mr. Barnes—Q. Captain Whitelaw, what is your business ?

A. My business is principally wrecking.

Q. How long have you been engaged in the occupation ?

A. 26 years.

Q. How long in this harbor and on this coast ?

A. 26 years.

Q. Have you had any experience as a mariner ?

A. Yes, sir.

Q. What has it been in a general way ?

A. I have been pretty nearly everything from captain to cook.

Q. How long have you been going to sea or acquainted with maritime affairs ?

A. 34 years.

Q. Do you remember Wednesday, the 22d of August, 1888 on which day a collision occurred in the bay betweeen the Occidental and Oriental Steamship Company's

steamship "Oceanic" and the steamship "City of Chester"?

A. I do.

Q. Did you, on that day, take any steps to ascertain the situation in which the "City of Chester" was lying at the bottom of the bay?

A. I did.

Q. State the circumstances under which you did that on the day of the disaster first.

A. On the day of the disaster I was working at South Vallejo with my wrecking steamer, and a telephone came to me that the "Oceanic" and the "City of Chester" had been in collision off the heads. I immediately telephoned down to find out if my steamer was required. If so, I would stop operations where I was and proceed to the scene of the disaster at once. I got a message back stating that they did not think I could do anything because the "Chester" had gone out of sight. However, I stopped operations, and came down that afternoon and located the wreck between 5 and 6 o'clock the same day of the accident.

Q. How much water was she lying in?

A. Her bow lay in 49 fathoms and her stern in 51.

Q. Which way was she headed?

A. Her head points nearly towards the barracks on Angel Island.

Q. You found her on that day?

A. Yes, sir.

Q. When next did you go to her?

A. It was some two years afterwards.

Q. Who did you go with?

A. I took a little tugboat called the "Ida W." and a young man whom I saw in Court the other day.

Q. Stand up, Mr. Bridgett.

A. He went with me.

Q. He is not very young.

A. Pretty young. Younger then, however. I took the bearings, as my memory serves me, from the date that I had been down there locating her before. When I run down on my bearings I struck the wreck at the first sounding.

Q. Look at the bearings, as marked on this chart of the bay here shown, and state whether those are the bearings you took and where you found the ship?

A. This bearing I know is correct; Point Diablo and Point Bonita directly in line. The outer edge of the line drawn from the outer edge of Point Diablo and the light at Point Bonita.

Q. That is, that line protracted strikes the rock?

A. Yes, sir.

Q. How about the other bearings?

A. I could not tell exactly from this. I had a line from a flagpost that was on the fort on to a rock down on the south shore.

Q. And the protraction of that line—

A. Gave me the range of the rock crossing this line of Point Diablo and Point Bonita.

Q. Well, will you indicate on the map where you found that wreck to be under water the first time you went there?

A. According to this line this is absolutely correct. On the map I cannot say exactly, because there is nothing

to show this fore shore here. I am under the impression that where these lines intersect is very nearly correct.

Q. The second time you went there with Mr. Bridgett did you take the same bearings ?

A. Yes, sir.

Q. Did you find the ship ?

A. I struck her at the first sounding.

Q. Where was she, in the same position she was when you examined her two years before.

A. Yes, sir.

CROSS-EXAMINATION.

Mr. White—Q. What depth of water was she in ?

A. Her bow is in 45 fathoms; her stern in 51.

Mr. Barnes—Allow me to ask one more question.

Q. At that depth is it possible for divers to go down and work upon a wreck ?

A. No, sir; it is impossible for any diver to work more than 26 fathoms.

Q. So that you found her by soundings ?

A. Yes, sir. The way I discovered her first was on account of the oil coming to the surface of the water.

Mr. White—Q. Are you familiar with this chart, the Government chart of this harbor, of which this is an enlargement ?

A. I think so; I think I know something about the chart.

Q. You understand that these large-size figures here indicate the number of fathoms, depth, at the different points they are placed ?

A. I don't consider that chart is correct at all, as far

as soundings. I have found a difference in crossing there of 50 feet; a difference of 12 fathoms.

The Court—Q. Between the depth and what is displayed on the chart?

A. Yes, sir. There are deep holes that seem to be gouged out; that you go along and you strike a sounding, and the first thing you know you strike down from three to five fathoms, just the same as going off a precipice.

Mr. White—Q. Then the fact that the nearest marks of depth here to the point of collision, as marked by you, indicates no greater depth than 45 fathoms, and the next nearest only 38 and 34, is of no importance in your idea?

A. No, sir. Here is 53 right there, while only 27 here, and 15 here. You might sound ten times in the width of this room and no two times you will get the same depth.

Q. How far out from the shore was this rock which you used as the back point?

A. Not very far; pretty close in.

Q. You cannot tell whether this line as drawn, from that rock and through Fort Point, goes up to the point as marked on this chart?

A. This does not show here the mark that I have reference to. When you are out on the position there on the vessel, you can see whether you get the two ranges in position. I generally locate the rock or locate an anchor. I get two fixed objects and watch until I cross that line. If I strike it once I can always strike it the second time. There is nothing here to show any of the rocks along this shore.

Mr. Barnes—Q. You are perfectly certain that the

line starting at Point Bonita light, crossing Point Diablo, protracted from there strikes the wreck?

A. Yes, sir.

Q. No doubt about that?

A. I am positive of that line, because I ran down after it had been drawn two years. I edged over here until I got that in line, and steamed down slowly until I opened a range here. The very moment I saw the bow of the boat cross the range I ordered the tug to stop and the moment she settled back, as it was flood tide, I dropped the lead and hit the wreck at once.

Q. Mr. White—You said something about Angel Island; where is that?

A. Over here.

Q. What line did you make use of to Angel Island?

A. I had no line between this and Angel Island. It was just an open view.

Q. What use did you make of Angel Island in locating the wreck?

A. I merely noted it. I did not use it as a location for the wreck.

Q. The "Chester" headed a little back towards Angel Island?

A. Yes, sir.

The Court—Altogether, he said?

Mr. White—Altogether. What direction would that be, giving the points of the compass for it—that is, about?

A. I think about east northeast. I should have to look at the chart to be positive about that. It serves me in my mind it would be about east northeast.

Q. So far as you know, the wreck may have been

further in to the harbor or further out towards the heads than this point indicated by these three converging lines on the chart?

A. I think that is pretty nearly correct where it is now. In drawing a direct line between Lime Point and Fort Point, she was in, I should judge, 250 yards inside of that line—from that to 300.

Q. In making that estimate, do you take some specific point here on the north side?

A. I take the fog signal as being Lime Point, with the flagstaff on the fort.

Q. From 250 to 300 yards inside of that?

A. Yes, sir.

The Court—Q. From the bearing of the land and the sea, was the wreck nearer to lime Point than it was to Fort Point?

A. Yes, sir; it is about three-fifths of the distance towards Lime Point and two-fifths from Lime Point this way. That is on the San Francisco shore. It was three-fifths from the San Francisco shore towards Lime Point, and I estimate two-fifths of the distance from Lime Point this way (pointing).

Q. That is on an angle?

A. On an angle, not a direct line. She is inside of the direct line between the two.

Q. She is nearer Lime Point than she is Fort Point?

A. Yes, sir.

Q. By this proportion?

A. Yes, sir.

Mr. White—Q. You mean these proportions of 3 to 2?—

A. Are about correct.

Q. Are where these red lines would be, the position of them, not the length of them?

A. Not the length of them, but the position of the red lines.

Q. The red lines from the point of wreck to the flag-staff at Fort Point would be to the red line from the scene of wreck to the north shore as 3 is to 2?

A. About that; yes, sir.

GEORGE E. BRIDGETT. Called for the defendant. Sworn.

Mr. Shay—Q. What is your occupation?

A. At the present time?

Q. Yes.

A. Shipping clerk at the Risdon Iron Works.

Q. On the 22nd of August, 1888, in what business were you engaged?

A. Second officer of the steamship "Oceanic."

Q. At that time how long had you been serving in such capacity upon the "Oceanic"?

A. About two years, I think.

Q. At that time for how long a time had you been following the sea?

A. Between ten and twelve years.

Q. In what capacity?

A. In different capacities, working my way up.

Q. You were a licensed officer at that time?

A. Yes, sir.

Q. From what body did you hold your license?

A. I held a mate certificate out of England.

Q. Beginning with the morning of August 22nd, 1888, say at 4 o'clock in the morning, and go on and state what to your knowledge occurred upon board of the "Oceanic" up to the time of the collision with the "Chester."

A. At 4 o'clock in the morning I came on deck and went forward on the whaleback.

Q. That is this point here (pointing)?

A. Yes, sir; to keep a lookout, the weather being hazy and a little thick at times. The vessel was going, I believe, at that time slow or half speed, the Captain and chief officer being on the bridge. We had also two sailors on the lookout on the whaleback, one on each side of the whaleback. We proceeded up towards the whistling buoy, stopping several times for soundings. We got up in the neighborhood of the whistling buoy and heard the whistling buoy; heard the signal from the pilot boat, and afterwards picked up the pilot. The pilot being on board, I went on the bridge, the chief officer leaving the bridge and going forward on the whaleback.

Q. At about what time in the morning was that?

A. Just after the pilot came on board; somewhere about eight o'clock. We proceeded towards the whistling buoy; not hearing it as soon as was expected, the Captain proposed to stop the ship, which was done, there being no no noise. We heard the whistling buoy, and the pilot then shaped our course towards the North Head, and, steering on that course some fifteen or twenty minutes—I would not be sure about the number of minutes—we picked up the whistle on Bonita Point. The Captain and pilot gave orders to look out for the nine-fathom buoy,

and requested the pilot to keep to the north side of mid-channel. We did not see the nine-fathom buoy at all, but we picked up a sailing ship, which was at anchor, with the tug "Relief" ahead of her. That sailing ship, when we passed her, was heaving her anchor to proceed into port, I believe. Our pilot hailed the Captain of the tug and asked him what the weather was like inside, or at the heads. The answer, I believe, was "yes"—we understanding him to mean that it was clearing inside. We proceeded slow, and several times stopped, and sometimes we went half speed when it was clear enough and prudent to do so. We got up past Point Bonita, and afterwards passed Point Diablo. We could see Point Diablo down the water's edge quite plain, and passing Point Bonita we could just see the loom of the high land. We were then proceeding dead slow, and the whistle had been going all the time ever since four o'clock in the morning.

Q. Giving what signal ?

A. Giving one signal.

Q. That is known as what?

A. As the ordinary fog signal. We passed Point Diablo. Just after doing so we heard the whistle of a steamer which appeared to be coming out. Everybody's eyes were attracted in that direction. Just after hearing her whistle two or three times the ship appeared. The pilot gave the order to blow two blasts and the helm to be put hard a-starboard, he then standing right over the wheel-house where he could see that the quarter-master was putting the helm hard a-starboard; and the two whistles were blown by myself, standing here alongside the telegraph.

Q. Where was the whistle?

A. The whistle is here, blown by a line along by the bridge.

Q. You had that line in your hand all the time?

A. Yes, sir. I was standing right between the telegraph and the line. The line is made fast here (pointing). All I had to do there was to take hold of the line and pull it, or work the telegraph, whichever was required.

The captain said to the pilot, "That is all right; she has answered our whistle." Still watching her, the captain said, "She does not seem to answer her rudder;" and the pilot said, "No, blow two whistles again;" which was done. Then the captain said——

Q. (Interrupting.) Did she answer those two whistles?

A. She answered both whistles each time; the captain then said, "Full speed astern;" and he worked the telegraph himself.

Q. How long a time elapsed between the blowing of the last two whistles and the order to go full speed astern?

A. Almost immediately. The vessel came along acting as though she was under the influence of her port helm; she came right along and struck the "Oceanic" right in the bow. The captain then said, "Order the engines to be stopped immediately." He said to the pilot, "You go forward and ascertain what the damage is, and give me the orders to do whatever you want me to do." The captain then said, "That vessel is sinking." And he ordered the boats out; he ordered—he gave orders that the "Oceanic's" boats be cleared away and lowered, and I left the bridge and went with four sailors—with four or five sailors—and lowered number eight boat—that is the one

(referring to the photograph of the "Oceanic")—and the four sailors came in the boat with me, and we pulled up towards the bow of the "Oceanic," and there were two men hanging from the end of the bow of the "Oceanic," right here (showing.) I won't be sure whether they were on two different ropes or on the same rope, and I got them in the boat, and somebody said, "look out," and I looked up and saw the foreyard of the "Chester" right on this rail of the "Oceanic" (showing), and almost immediately it came down across the boat and struck the boat forward in the midships and capsized the boat right straight into the water, throwing the two ladies and the four sailors and myself into the water, and I went down; I remember going down, and I did not see anything until I afterwards came up out of the water amongst a lot of wreckage; the ship had entirely disappeared, and with the assistance of the men that were in the water I got a hold of some of this wreckage, and was afterwards picked up by the fourth officer and brought to the "Oceanic"—the fourth officer's boat being full of passengers from the "Chester"—and when I got on the "Oceanic" and went on the bridge, the captain was still there, and I think the pilot was still forward. It was some time after the collision.

Q. At what distance from the "Chester" was the "Oceanic" when you first saw her?

A. A half mile.

Q. What was the character of the weather—fog, etc.?

A. Well, it had been foggy—clearing at times, and at that time you could see a half mile away.

Q. When you first saw the "Chester," in which direc-

tion was she heading as regards the "Oceanic?" Just show by those models.

A. (Placing the models in position.) That is about the position as near as I can give it, I think.

The Court—They were about half a mile apart?

A. Yes, sir.

Q. If when the first interchange of signals took place the City of Chester had been turned to the left and had minded her helm, would there have been any danger of a collision?

A. No, sir; impossible.

Q. If when the second interchange of signals took place the City of Chester had acted as indicated by the signals, would there have been a collision?

A. No, sir, I do not think there would.

Q. Do you remember having gone with Captain Whitelaw to locate this wreck?

A. Yes, sir.

Q. At what time did you do that?

A. November 30th, 1890.

Q. Did you assist in making soundings, and did you make soundings yourself?

A. Yes, sir.

Q. Can you point out from the chart where the wreckage was at that time?

A. Yes, sir.

(Refers to the chart.)

Q. Explain to the Court just what you did on that occasion, and how you located the wreck, and where the wreck was at that time.

A. Coming down the bay on the tug "Ida W.," Cap-

tain Whitelaw and myself, he said if we kept Point Diablo and Point Bonita in a line we were bound to come over to the wreck, and we got so far down, and he said: "We are right over the wreck." Now the tug stopped and backed a little, and soundings were taken, and we were right over the wreck, and dropped a grapple down, and the grapple stuck to the wreck, and with some difficulty we got it clear and found that it had been in the woodwork of the Chester, and we dropped the grapple again, and we took these bearings.

Q. The bearings are in red lines upon the map?

A. Yes; Point Bonita and Point Diablo in a line extended right up to Fort Point bears south quarter west, and following up here to the needles bears northeast by west, quarter west, and that is the position of the wreck.

Q. That is where she was November, 1890?

A. Yes; with 51 fathoms at one end and 49 fathoms at the other end.

By the Court—Q. How far away from Point Bonita were you when you first discovered the loom of it—the form?

A. We discovered the loom of Point Bonita when it was right abeam, between a quarter and a half a mile I should judge.

Q. How far was Point Diablo to the north when you passed that point?

A. A little over a quarter of a mile, sir.

CROSS-EXAMINATION.

Mr. White—Q. Did you see the shore on the north side?

A. Yes, sir.

Q. Did you see anything of it?

A. No, sir.

Q. Did you see Fort Point?

A. No, sir.

Q. Nor the loom of it?

A. No, sir.

Q. When did you first see Fort Point, if at all?

A. I did not see Fort Point at all; not until after the collision; I had not seen it before.

Q. Did you see Lime Point?

A. Yes, sir.

Q. How far off from you was Lime Point at the time of the collision?

A. Less than a quarter of a mile.

Q. How many points off your starboard bow was the Chester when you first saw her?

A. Two and a half to three points.

Q. And about half a mile distance?

A. Yes, sir.

Q. Did you watch her from that time up to the time of the collision?

A. Yes, sir.

Q. At the time the second signal was sounded from the Oceanic how many points off your starboard bow did the Chester appear to be?

A. About three points.

Q. She appeared, then, to have gone to starboard during that time; is that right?

A. No, sir.

Q. Then you thought it appeared to you that she was

further—a greater number of points off from you at the time of the second signal than she was at the first?

A. I don't know that she was.

Q. I understood you to say that at the time of the first signal she appeared to be about two and a half or three points from you?

A. Yes, sir.

Q. And at the time of the second signal, about three points?

A. Yes; well, she might have been two and a half points or three points; about in the same position.

Q. What direction did she appear to be heading at the time the first signal was sounded?

A. Right for the bridge of the Oceanic; may have been a little bit abaft of the bridge.

Q. What direction did she appear to be heading at the time of the second signal?

A. The same direction.

Q. Appeared to be heading towards the bridge of the Oceanic?

A. Yes, sir.

Q. How much nearer was she; what distance were the ships apart at the time the second signal was sounded?

A. About a quarter of a mile; may be a little less.

Q. That is, between the first and second signal the ships had covered about half the distance that was between them; is that right?

A. Yes, sir.

Q. After the second signal was sounded, what was the action of the Chester?

A. She appeared to be acting under the influence of her port helm.

Q. What way did she turn; will you indicate by the model?

A. She turned this way (showing).

Q. Did she appear to be going in a circle around toward her right in this way, so as to come across your bow?

A. Not exactly a circle; she appeared to be going in this fashion (illustrating).

Q. Made some progress towards the Oceanic, and at the same time turned her bow more to her right all the time?

A. Making pretty rapid progress towards the Oceanic and turning her bow.

William Allen. Called for the defendant. Sworn. Testified as follows:

Mr. Shay—Q. Mr. Allen, what is your occupation?

A. Marine engineer.

Q. On the 22nd day of August, 1888, was it the same?

A. Yes, sir.

Q. You were then chief engineer of the steamship Oceanic?

A. Yes, sir.

Q. How long had you been such?

A. Since January, 1883.

Q. For how long a time have you been an engineer?

A. Twenty-seven years; twenty years chief engineer.

Q. And licensed from where?

A. Great Britain; Liverpool.

Q. Upon the 22nd day of August, 1883, what was the condition of the machinery upon the Oceanic?

A. Good condition.

Q. First-class?

A. Yes, sir.

Mr. White—I will admit that it is good.

Q. And you had a regular staff of engineers and assistants?

A. Yes; six engineers and a boilermaker.

Q. Do you know what was about the speed of the Oceanic upon the morning of that collision at various times, say from 4 o'clock on in the morning?

A. Yes sir; at 4 o'clock we stopped and took soundings, and then proceeded at various speeds until we picked up the pilot, and for eleven minutes prior to the collision we were going dead slow, making about twenty revolutions a minute.

Q. By "dead slow" you mean what?

Mr. White—Q. Is there an engineer's log kept by you that shows all these things?

A. Yes, sir.

Q. Have you that here?

A. I have not.

Mr. Shay—I have it; it is here.

Mr. White—I submit that the record made is the best evidence.

Mr. Barnes—The log is not better evidence than the testimony of the officer.

The Court—Objection overruled.

Mr. White—We except.

Q. What do you mean by dead slow?

A. A speed as slow as I can drive the engine with safety without having them stopped.

Q. Enough to keep steerage way on the ship?

A. Yes, sir.

Q. Do you know what was the character of the weather upon this morning?

A. Foggy weather.

Q. Very foggy?

A. Well, I don't know much about the fog, except that we would stop occasionally and the speed was varied occasionally, but I know for a fact that at 9:14 we went dead slow, and the next thing was we went full speed astern.

Q. When the order came to put the engine full speed astern, was that order obeyed at once?

A. At once.

Q. Did the engineers respond at once?

A. At once. The first engineer had the wheel, handling the engine.

Q. Do you know whether at the time of the collision the forward speed of the vessel had been stopped?

A. I know that we had gone astern for two minutes—full speed astern—and I think that at the rate of speed she was going that it ought to have been stopped—must have been stopped.

Q. Did you see the collision yourself?

A. No, sir.

Q. You were down below at that time?

A. I was down in the engine room.

Q. Do you recollect whether or not there was any shock at the time the ships came together?

A. Not much shock; I was just getting down off the platform at the time.

A. Did you hear any crash?

A. No, sir.

CROSS-EXAMINATION.

Mr. White—Q. Where were you all that morning from 4 o'clock up to the time of the collision?

A. In the engine room.

Q. All the time?

A. Yes; my room is at the top of the stairs, so that I was in communication with the engine room all the time, as required in my position, and in foggy weather I am always on duty.

Q. How many minutes had you been going dead slow just prior to the order to go full speed astern?

A. Eleven minutes, sir.

Q. Just eleven minutes?

A. Yes, about eleven minutes; eleven minutes by my records.

Q. How many minutes did you go full speed astern before the collision?

A. By my records two minutes.

Q. Two minutes?

A. Yes, sir.

Q. Who made the record?

A. It is made by the engineer telegraphing below, and entered by me in my log book.

Mr. Barnes—Mr. Allen, won't you explain to the Court just how these things are done down in the engine-room; how you get the signals, and how they are answered back;

how they are obeyed, and how they are answered back that they are obeyed?

Witness (referring to the apparatus in Court)—This is quite different from what they have on the Oceanic, as far as the bells are concerned; but the officer on the bridge rings that telegraph, and it produces the signal on our telegraph below, in the engine-room, and rings the bell at the same time.

Mr. Barnes—Just explain how you do it.

The Court—Let the second officer give the signal from the bridge.

Mr. Barnes (to the second officer)—You go on the bridge now and regulate that speed. Where is she at now?

A. Stopped.

Mr. Barnes—Now send her halt speed ahead

(Here the witness illustrates.)

(The witness then explains by actual experiments on the telegraphic apparatus how to regulate the speed of the vessel and how to stop the vessel, and in explanation of it, says:

The one on the bridge telegraphs to us below, and then our pointer travels to where he wants us to go and rings a bell; then we take a hold of the hands and signal them upstairs that we understand them, and then the engineer is always there to at once execute the order.)

By Mr. White—Q. As to the time that was consumed, are you testifying from your own knowledge or from what your log book shows you?

A. From my own knowledge, and also having kept a log for my owners; I remember distinctly.

Q. Did you take the time yourself—the eleven minutes dead slow and the two minutes full speed astern?

A. No, sir; the young man on the telegraph; I think it was either the fifth or sixth engineer; he is here in Court.

Q. How do you know, then, what length of time it was?

A. I know because the book shows for itself.

Q. The book shows?

A. Yes; the book shows the items and all that sort of thing.

Q. As I understand you to say, the telegraph on the Oceanic is not exactly like this one?

A. Not exactly like it; but it is the same, except there is no electricity about it.

Q. On the Oceanic there are two levers on each one of these dials?

A. Yes, sir.

Q. And you turn one first to signify up from the engine-room that you understand the signal, and then you turn another one to make your engine obey?

A. No; we signal that we understand it, and execute it at the same time.

Q. By one motion?

A. Yes; so the Captain knows at once that we carry it out.

Q. Now, when you turn that lever that takes the message up onto the bridge, and you say that the order is executed at the same time?

A. Yes, sir.

Q. All at the same time?

A. Yes, sir.

Q. Then there are two levers connected with each instrument?

A. There is only one lever in the engine-room for handling the telegraph to reply the Captain.

Q. You don't have one lever to signal up to the Captain or pilot and another one to make the engine move?

A. Oh, no.

By Mr. Barnes—Q. The same motion which produces—which operates the engines, notifies the Captain, as I understand it?

A. Oh, no; the telegraph is for telegraphing to the Captain that we understand his orders, and the first assistant engineer is handling the levers; he executes the order.

By the Court—Q. There are separate levers?

A. Yes, sir. The junior engineer is at the telegraph, and another engineer is at the lever at the engine and handles it.

By Mr. White—Q. One engineer answers the telegraph and the other one manipulates the lever of the engine?

A. Yes, that's it exactly; that is the position in the engine-room.

Q. How is it with this one?

A. It just as quick, sir; just as quick on the Oceanic.

Q. This machine here actually starts the engine, doesn't it?

A. Oh, no; it doesn't start the engine.

Thomas Mirk. Called for the defendant. Sworn. Testified:

By Mr. Shay—Q. Mr. Mirk, what is your position at present?

A. Chief engineer of the Metropolitan Electric Railroad.

Q. That is a street railroad in this city ?

A. Yes, sir.

Q. How long have you been with the company ?

A. Since it started ; a little over a year ago.

Q. Upon the 22d of August, 1888, you were an engineer or assistant engineer upon the steamship Oceanic, were you not ?

A. Yes, sir.

Q. What were your duties upon that morning, and where were you stationed ?

A. Standing by the telegraph and taking notes.

Q. Where, by the telegraph ?

A. In the engine room.

Q. Do you know at what speed the Oceanic was moving at various times upon that morning ?

Mr. White—That is under my same objection—that it is not the best evidence, and that it appears that there was a log kept.

The Court—Yes, sir.

A. She was going at various speeds, changing every few minutes ; of course it was marked all down on the log; every change that is made is marked down ; sometimes we would make two changes or more in a minute

Q. Say for half an hour before the collision with the "Chester," what was the speed of the "Oceanic ?"

A. Slow and dead slow eleven minutes previous to the collision.

Q. And during that eleven minutes she did keep at dead slow ?

A. Dead slow.

Q. Do you know at what time before the collision, if at all, an order came to the engine room to put the engines full speed astern?

A. I can't tell the exact time.

Q. How long before the collision did you get such an order?

A. Well, the only way I could tell about the collision was that we felt a slight shock, and the engines had been going nearly two minutes full speed astern.

Q. What was the character of the shock?

A. Well, we just felt as though we had struck something.

Q. Was it severe at all?

A. No, it was quite slight.

Q. Did you hear any crash of timbers or anything of that kind?

A. No, we could not hear anything below.

Q. Did you hear the whistle sounded by the "Oceanic" that morning?

A. Well, they sounded the whistle all the morning—the usual fog signal.

Q. Did you hear the other whistles, if any, that were sounded?

A. No, I can't say that I heard any other whistle outside the fog whistle.

CROSS EXAMINATION.

By Mr. White—Q. You say you had been going nearly two minutes, or not quite two minutes, full speed when the shock occurred?

A. Yes, sir.

Q. Were you the one that made the record?

A. Yes, sir.

Q. When did you make it?

A. Immediately when the telegraph is given I note it down in the book.

Q. Just note it down in the book?

A. Right there; that is all I do.

Q. Did any order come to you at the time the collision occurred—at the time you felt the shock?

A. It was just a little after when they rang, "Stop."

Q. To stop?

A. Yes, sir.

Q. After that how long was it before you got an order?

A. Probably another minute, I think; something like that. I think we went ahead a little then.

Q. About a minute?

A. Yes, sir.

Q. What order did you get in a minute after you got the order to stop?

A. Slow ahead.

Q. Did you enter that in the log?

A. All in the log.

Q. What other order did you get; what was the next one after that?

A. To stop.

Q. To what?

A. To stop.

Q. How long was that after you got the order to go ahead?

A Oh, probably half a minute; we only made a few revolutions.

Q. Did you enter that in the log?

A. Yes, sir.

Q. What order came next after you got that order to stop?

A. Oh, some time after, I think we went ahead; my memory don't follow it up, although it is all in the book.

Q. Do you know how long it was after?

A. Well, it was quite a little while after.

Q. What was the next order that you remember?

A. I could not say; I don't remember.

Q. Now, as I understand you, for some minutes before the collision you had an order to go dead slow, and you obeyed it, and entered that in your book?

A. Yes, sir.

Q. Then, in not quite two minutes before the collision, you received the order, "Full speed astern," and you obeyed that?

A. Yes, sir.

Q. Then a little time after the collision, or just at the collision, you got the order to stop, and you obeyed that?

A. Yes, sir.

Q. Then, in about a minute, you got an order to go ahead, and you obeyed that?

A. Probably in about a minute we went ahead a little.

Q. Then, at the end of that minute, you got an order to stop.

A. Yes, sir.

Q. And obeyed that?

A. Yes, sir.

Q. And then, you say, it was perhaps some minutes after that before you got any further order?

A. Oh, yes; it was quite a little time after.

Q. You don't know what the order was?

A. I don't remember whether it was astern or ahead.

Q. But you entered these things yourself in the log in the engine-room at the time?

A. Yes, sir.

ARCHIBALD B. BROLLY. Called for the defendant. Sworn. Testified:

By Mr. Shay—Q. Mr. Brolly, upon the 22d of August, 1888, you were the second engineer on board the steamship Oceanic, were you?

A. I was.

Q. Second assistant engineer?

A. Second engineer, or first assistant.

Q. Do you recollect about what time the pilot came on board the Oceanic on that morning?

A. No recollection.

Q. Do you know whether or not it was about 8 o'clock?

A. I have no recollection of that.

Q. Do you recollect at what speed the "Oceanic" was moving after the pilot came on board of her?

A. At various speeds—

Mr. White—(interrupting.) Let the reporter note my objection to that, the same as before stated.

A. (Continuing.) Not exceeding half speed.

Q. Do you remember the fact that a collision occurred that morning?

A. I do.

Q. Do you remember about what time in the morning it occurred?

A. By our clock in the engine-room it was somewhere in the neighborhood of 9; shortly after 9 o'clock.

Q. Pretty close to 10, wasn't it?

A. It was after 9; I don't recollect the exact time; it is five years since I gave my testimony.

Q. Did you feel any shock at the time?

A. A very slight one; a very slight shock.

Q. Do you know what was the speed of the "Oceanic" shortly before the collision, say for twenty minutes or so before?

A. Not of the ship.

Q. Do you know how the engines were running at that time?

A. Yes, sir.

Q. How?

A. Dead slow.

Q. Say for two minutes before the collision, do you know how the engines were running?

A. Full speed astern.

Q. Were you in charge of the engines at that time?

A. Yes, I was in charge of the engines.

Q. How did you receive your order to put the engine full speed astern?

A. By telegraph, and also verbally from the engineer who was stationed at the telegraph in the engine-room.

Q. And upon receiving the order from the bridge to put the engines full speed astern, did you at once comply with it?

A. At once.

Q. Did the engines at once respond?

A. Immediately.

CROSS-EXAMINATION.

By Mr. White—Q. How many minutes had you been going dead slow before you got the order "full speed astern"?

A. Eleven minutes.

Q. How many minutes was it from the time you received the order full speed astern before you felt this shock?

A. It was about two minutes.

Q. And how long was it from the time you received the order full speed astern until you received the order to stop?

It was about two minutes; it was almost immediately after.

Q. What next, after you received the order to stop, what next order did you receive?

A. As well as I can remember, we went dead slow ahead, just for a few turns.

Q. Did you receive that order?

A. I received that order.

Q. You did nothing at all except you received the order from above?

A. I worked the engines; controlled the engines.

Q. You did nothing with the engines unless you received the order to do so?

A. No.

Q. And how long was it, as near as you can remem-

ber, from the time you received the order to go ahead until you received another order?

A. I say we only made a few turns, meaning probably a few seconds.

Q. Probably what?

A. Probably a few seconds.

Q Then what order did you receive?

A. To stop.

Q. And what order did you receive after that, and when did you receive it?

A. I didn't for some time afterwards; considerable time.

Q. About how long afterwards, to the best of your recollection?

A. I can't recall that time; it was considerable time afterwards.

Q. Do you recollect what the next order was?

A. No, I have no recollection of the next order.

James Swan. Called for the defendant. Sworn. Testified:

By Mr. Shay—Q. Mr. Swan, upon the 22nd of August, 1888, you were the second officer on the Oceanic?

A. I was the third officer on the Oceanic.

Q. What was your station upon the ship—where was it?

A. On the after end of the ship, to look after the steering gear particularly.

Q. Just point it out on that photograph.

A. I was aft, about there, to look after the steering gear.

Mr. White—I admit everything that General Barnes

said in his opening statement relative to the position of this officer, and what he was there for, and what he did.

Q. Well, stationed at your post, did you hear anything indicating—

A (interrupting). When we reached Point Diablo, just inside of it, I heard the fog whistle.

Q. From some other steamer?

A. From another steamer on our starboard bow.

Q. Did you see that steamer?

A. Not then; there were two blasts of whistles coming from the Oceanic, and she replied. I didn't see her then, and immediately afterwards I saw her, and the Oceanic gave two blasts more, and she repeated it.

Q. How far off was this steamship when you first saw her?

A. I think about a half a mile.

Q. In about what direction was she heading?

A. She was heading—I could not exactly say—but she was heading towards us; towards our bridge.

Q. Do you know about how far off; how many points she was from the bows of the "Oceanic?"

A. Well, I should say from two and a half to three points; not less than two and half.

Q. Did you hear her from that time up to the time of the collision constantly?

A. Yes, sir.

Q. You saw her all the time?

A. Yes, sir.

Q. After she had responded to the second blasts of the "Oceanic," if she had minded her helm, and if she

had done as her whistle indicated, do you think there would have been a collision?

A. No, sir; there would have been none.

Q. After the second interchange of signals, what did the "Chester" seem to do—what did she do?

A. She seemed to turn on her port helm and slide right on to us.

Q. Did you feel any shock at the time of the collision?

A. No.

Q. At the time of the collision what did you do, and immediately afterwards?

A. On reaching the forward end, after trying to get some of them up over the bows, the chief officer gave me orders to put the boats out, and I put Number three boat out and started to leave the "Oceanic," and when we left the ship, Captain Metcalfe said to me, "Be careful when you get inside the ship so you don't get taken down with it," and I went over to the "City of Chester," and I saved all the lives that I could.

Q. How many people did you save?

A. Thirty-two; I had thirty-six, but four left my boat and went into one of the "City of Chester's" boats, and I delivered thirty-two to the ship.

Q. How many boats did the "Chester" lower?

A. I only saw one.

Q. How long before she sank was that boat lowered?

A. Well, I was alongside of the "City of Chester" before she was put into the water, so it could not have been very long. For I was forward on the "Oceanic"—on her bow—and I rushed aft to get the boats down, and went over to the ship; I can't say the time that I was there

when the ship went down; some say it is four minutes, some say it is six minutes after the collision; I could not tell because I was too much occupied to tell the time; but their boat was about one minute or two minutes in the water before she sank.

Q. At the time that you saw the "Chester" coming in the direction of the "Oceanic," at what speed was the "Chester" moving?

A. Well, I should think she was going at the rate of seven miles an hour.

Q. What was at that time the speed of the "Oceanic?"

A. Well, she was dead stopped; and if she had any speed at all, she was going astern.

Q. At the time of the collision?

A. At the time of the collision she wasn't going through the water, ahead, at all,

Q. What was her speed shortly before the collision?

A. Oh, we were coming in dead slow, sir, for about fifteen or twenty minutes.

Q. At the time you saw the Chester, where were you?

A. I was aft.

Q. Whereabouts aft?

A. I was in the after end of the ship, here, on the starboard side (showing), and, as I saw that the collision was unavoidable, I walked forward.

Q. At the time of the sinking of the Chester, where were you?

A I was within ten or twelve feet of the Chester.

Q. In the boat and in the water?

A. In the boat and in the water.

By Mr. White—Q. Which side?

A. On her port side.

Q. At the time the Chester went down, she went down head first?

A. Yes, sir.

By Mr. Shay—Q. She went down head first?

A. Yes, sir.

Q. At the time that she went down, did you notice the position of her rudder?

A. Her rudder was a-port when she sunk.

CROSS-EXAMINATION.

By Mr. White—Q. How far away from the port side of the City of Chester were you when she went down?

A. I don't think it was over fifteen feet.

Q. How far back from her bow were you?

A. Oh, I know I was about here (showing), and the ship was there (showing).

Q. What do you mean by being there (showing)?

A. Well, about thirty feet from her stern, or twenty feet when she commenced to sink; and then, as she commenced to sink forward, I was only about fifteen feet from her propeller; I had to shove her off with my oar.

Q. You were trying at that time to get your boat further away from the Chester?

A. I did; yes, sir.

Q. That is what you were trying to do?

A. Yes, sir.

Q. What was the position of you boat towards the Chester at the time; how was your little boat headed?

A. Head end on to her.

Q. Which end?

A. Bow on.

Q. The bow towards her?

A. Yes, sir; the bow towards the Chester.

Q. Where were you in the boat?

A. I was in the forward end; I was in the bow of her.

Q. What were you doing?

A. I was trying to save lives.

Q. And you were in the forward end of your boat?

A. Yes, sir.

Q. And that is the time that you say you took the snap shot of her and saw that the propeller, the rudder of the "Chester" was turned to port?

A. I don't say it was hard over, but it was more than a half over to port.

Q. On which side of the "Oceanic" did you lower your boat?

A. On the starboard side.

Q. Which boat was it?

A. Number three.

Q. (Indicate on that photograph which boat it was).

A. (Referring to the photograph of the "Oceanic.") This boat, on the opposite side; right opposite this.

Q. The boat which is at the left of the funnel?

A. It is on the right of the funnel; this is the left; this side is the port side of the ship.

Q. And the boat on the other side, from where it shows here on the picture?

A. Yes, that boat is a little further forward than she was.

Q. Now, as I understand you to say, when the collision

occurred you were here at the stern, looking after the hand gearing for steering ?

A. Yes, sir; just before it happened.

Q. And when the collision occurred, you ran forward to the bow of the "Oceanic," did you ?

A. Yes, sir.

Q. That distance is something like four hundred feet ?

A. Yes, four hundred feet; it does not take a man very long to go there.

Q. And then you helped to get people over the bow for a while ?

A. Yes, sir.

Q. And then you went back on the starboard side, just about midships, or right as far back as this funnel, and lowered the boat ?

A. Not quite so far as the funnel.

Q. And after lowering your boat, you rowed your boat forward until you were on the port side of the "Chester," and you rowed almost to the stern of the "Chester" before she went down ?

A. Yes, sir.

Q. What length of time when you saw the rudder ; just what length of time did you see it ?

A. Well, the ship was going down pretty quick ; I could not see it over a minute; the ship was turning right over end, and I had every chance to see it, because her keel was thrown right out of the water ; I could see her keel for twenty feet or more from her stern post.

Q. Did you row around towards the front, towards the bow of the "Chester" at all ?

A. No, sir.

Q. But you came well around towards the stern of the "Chester" with your boat from the first?

A. Yes, I could not get on this part of the ship because I was on the port side, and here she was close to the "Oceanic," and I could not get in between the "Oceanic's" bow and her bow with safety.

Q. Do you remember that you noticed the "Chester's" rudder when the people had all or nearly all left her?

A. Yes, I guess so, and I saw a man sticking up on the after end, and I thought I would get him when she went down, and the Captain was still there—I don't know what became of that man—and the Captain, just before she sank, he left the bridge and jumped overboard.

Q. You make an estimate that the Chester had a progress of six or seven miles an hour?

A. Yes, sir.

Q. Are you reckoning that as being her progress through the water, or as she would be viewed from a point on the land?

A. The progress through the water; I have nothing to do with the land.

Q. How did you form that idea?

A. Well, the time I have been to sea. We can almost tell how much a ship is going within a quarter of a mile or half a mile?

Q. How?

A. By looking at it and seeing the speed that it s going at.

Q. Did you compare the speed of the Oceanic at that time with any point on the shore, to see how fast she was going?

A. She had no speed at all.

Q. I am asking you whether you compared it with any point on the shore to see whether she had any speed or not?

A. I know she was not moving on the water.

Q. Did you compare the speed of the Oceanic with with any point on the sh re?

A. There was no occasion to do it.

Q. Did you compare the speed of the Oceanic with any point on the shore, yes or no?

A. No, I did not.

Q. Now, what was it that you judged by in determining what speed the Chester had?

A. By the foam or the break that she was sending from her bow.

Q. Do all ships going at the same rate of speed send the same break from the bow?

A. No.

Q. At the same rate of speed it appears much more on one ship than on another ship?

A. Yes, sir.

Q. Were you familiar with the Chester at that time?

A. I am almost familiar with any kind of a ship.

Q. Were you familiar with the Chester so that you knew how much foam she threw up from her bow?

A. No.

Q. Going at a certain rate of speed?

A. No.

Q You did not know, then, you could not tell absolutely by the appearance of her bow, what number of miles she was progressing through the water?

A. Not within a half a mile.

Q. Now, I will ask you, if a vessel were coming against a very strong tide and she was simply making progress enough to hold her against that strong tide, wouldn't it appear to any other vessel, from the appearance of her bow, that she was making progress through the water?

A. She would be making the progress the strength of the tide was running at. If the tide was running four miles—

Q (interrupting). Well, she might appear to make a good deal of progress, judging from the water of—the appearance of the water on her bow, if you looked at her from another vessel, and yet from the land she might not be making any advancement at all.

A. Not if she was not going any faster than the tide was running.

Q. Doesn't the tide sometimes run fast enough against a ship to throw the water up on her bow when she is simply holding herself against the tide?

A. The ship is going through the water.

Q Or, rather, the water is running past the ship; isn't that the idea?

A. No, the ship is going through the water; the water would take the ship with her if she was lying simply there, but if she is propelled she is going through the water.

Q. And yet, while the water might curl up a great deal from her bow, she would not make any progress on her journey, as being viewed from a point of land?

A. No, she would make no progress if she was going only as fast as the tide would run.

Q. She would make progress?

A. I say she wouldn't make any progress if the tide is running at the same speed that she is speeding, and she would remain stationary as far as the land is concerned.

Q. And yet she might appear to another vessel to be making considerable progre-s through the water, so far as the appearance of the break or foam on her bow was concerned?

A. Yes, sir.

Q. Isn't that so?

A. Yes, sir.

Q. Now, I will ask you another thing: Isn't it so, that people on one ship, viewing another ship, that it always appears to them that they are stationary and the other ship is coming towards them?

A. No; not to any man that is familiar with sea; not to a seaman, because he can always tell what the speed is that a ship is making.

Q. How can he see it?

A. By going through the water and estimating the speed; a seaman can always tell what speed a ship is going, within a quarter of a mile.

Q. And as to the condition of the Oceanic, you mean to say that she was going at whatever rate of speed the tide would carry her forward, with the speed, dead slow, added to that?

A. Not at the time of the collision; she was going astern then.

Q. I mean just prior to the collision.

A. Yes, dead slow; just enough to make her steer all right.

Q. And you think the progress of the Chester through the water was about six miles?

A. Yes, sir.

HENRY ALBERT MCLAUGHLIN. Called for the defendants. Sworn. Testified as follows:

By Mr. Shay—Q. What is your business?

A. Master and pilot of steamers on the bay of San Francisco and tributaries as far as Benicia and return.

Q. What were you doing on the twenty-second of August, 1888?

A. On the twenty-second of August 1888, I was temporarily in command of the tug "Relief."

Q. Upon the morning of that day, where were you?

A. On the morning in question I went out to sea, "seeking," as we call it, for a tow.

Q. Did you find any?

A. Yes, sir.

Q. What was the ship?

A. The ship "Lord Wolseley," if my memory serves me right.

Q. Where was she at the time you found her?

A. About two miles from the north head; a little to the north of the middle channel.

Q. Did you fasten on to her?

A. Not when I first saw her: I did later on.

Q. What time did you fasten on to her?

A. As near as I recollect now, it must have been in the vicinity of 9 o'clock; I cannot recollect sure for a few minutes; it has been a long time since this happened; about 9 o'clock; probably a few minutes before; very near 9 o'clock.

Q. Did you see the steamship "Oceanic" that morning?

A. I did, sir.

Q. What was she doing when you saw her?

A. She was coming in.

Q. At what distance did she pass you?

A. I think she passed me about three times her length.

Q. That would be three times five hundred feet, or about fifteen hundred feet?

A. Well, somewhere near that; I don't think quite as far as that; I think about twelve hundred feet.

Q. Did you notice at what speed she was going at that time?

A. At the time she passed me she was stopped.

Q. And when she steamed up again did you notice what speed she took?

A. As near as I could tell she was dead slow, or as slow as she could turn over.

Q. Now, did anybody upon the "Oceanic" hail you and ask you any questions?

A. Yes, sir.

Q. What was it?

A. Some one hailed me from the "Oceanic" and asked me how the weather was inside.

Q. Did you reply?

A. Yes, sir.

Q. What did you reply?

A. I told him, "Very thick until you get to the fort."

Q. Until you get to the fort?

A. Yes, sir.

Q. And how was the weather inside of that?

A. Clear when I came out.

Q. Did you tow in this ship, the "Lord Wolseley," that morning?

A. Yes, sir.

Q. How long after the "Oceanic" passed you did you steam up?

A. The ship was at anchor at the time and I was heading the ship and they were heaving the anchor short, and the anchor was about short, and just then the "Oceanic" passed out of my sight, and I swung the ship around to come in.

Q. To come right in?

A. I think so; yes, sir, I think very likely I turned the ship around probably fifteen minutes after the "Oceanic" passed me.

Q. The weather was such at the time that you deemed it safe to tow in a large ship with your tug?

A. I considered it safe, or I should not have come in.

Q. You did not see the collision itself?

A. No, sir.

Q. When you came in did you see the "Oceanic"?

A. Yes, sir.

Q. What was she doing then?

A. She was at anchor if I recollect right, just below Black Point, a little inside the middle channel.

By the Court—Q. Where was the "Oceanic," south of you or north of you?

A. When she hailed me, sir?

Q. Yes.

A. She was south of me.

By Mr. Shay—Q. Did you notice what course she took after passing you ?

A. I think about north-east.

Q. Will you point out upon this map where the ship, the Lord Wolseley, and about where you were on that morning. This is the bay, this is the gate, and this is the ocean out here (showing).

A. I think the ship Wolseley was about here (showing).

Q. Where we have that point marked "B" is that about it ?

A. I think the ship was about there as near as I can tell; as well as my memory serves me.

Q. And after the "Oceanic" passed you where was she ?

A. She was about where this black line is.

Q. That was about her course ?

A. I should judge she went a little north, towards the north head, as near as I could see the direction as she passed out of sight of me.

Q. She was steering and heading more towards the north than the south ?

A. Yes, sir.

Q. For how long a time did you notice her ?

A. I think probably about six minutes or so.

Q. And during all that time was she still pointing towards the north ?

A. Yes, I should say that the were going close to the north head.

(No cross-examination).

JOHN McDONALD. Called for the defendants. Sworn. Testified as follows:

By Mr. Shay—Q. On the 22d day of August, 1888, what was your occupation?

A. At that present trip I was engineer's store-keeper on the "City of Chester."

Q. Do you know about what time the "Chester" left its docks in San Francisco?

A. Yes, that was my place to take the time of such things; to assist the engineer on watch.

Q. At what time did it leave the dock?

A. We got the jingle bell eight minutes past nine o'clock.

Q. Did the steamship then pass out?

A. Yes; that was full speed. We had left the dock at 9 o'clock, and we got her backed out from the dock when we got the jingle bell. That is the time referred to in the log. It means, in the American phrase, "Hook her on." That was eight minutes past 9.

Q. Then eight minutes past 9, I understand you to say, the engines were started full speed ahead?

A. Yes, sir.

Q. For how long a time was that speed maintained?

A. The speed was maintained right until we got down pretty near off Fort Point After we got full speed ahead, after we got the jingle bill, and the log that was just a very little book and a pencil, and I had no further business for working on the platform there, and I went to my business in the storeroom, which was then a part of the engine room, as it generally is in a small ship; and I could see the dials of the telegraph at times when I would

look between the columns of the engine, as I used to look through there just to see if I could see anything, and it was just about a quarter of ten, and I heard the alarm. That is where the word from the people up above comes; it rings a little bell inside, and it is an alarm for to look at the dial, and I went around in front of the engine room.

Q. What did the dial then indicate?

A. The dial then indicated "stop." The second assistant engineer had just about put his hand to do it in place of me; my not being there, and he moved it in my place.

Q. Did any other signal come after that?

A. Yes, right away; full speed astern.

Q. Between the time when the City of Chester left its dock and began to go full speed was there any signal given from the bridge to the engine room until you got this signal to stop and go full speed astern?

A. I heard none.

Q. Were you in a position where, if anything happened to come along of that kind, that you would have heard?

A. I was in the storeroom, in the back of the engine room, just over the pumps.

Q. Well, did you hear any bell ring?

A. No, sir.

Q. If an order had come from the bridge by means of this telegraph would it have rung the bell?

A. Yes, it would have made a sound, a signal.

Q Did you feel the shock of the collision?

A. Yes, sir.

Q. How soon was it after the order was given for full speed astern?

A. Well, I took the time when we got—that was my place. I took the time. It was twelve minutes to 10 o'clock when the collision occurred; just exactly about two minutes from that.

Q. Two minutes afterwards.

A. Yes, sir.

CROSS-EXAMINATION.

By Mr. White—Q. How long a time elapsed from the time that the signal came to stop before the signal came to full speed astern?

A. Very short time, sir.

Q. Did you take that?

A. To stop? No, sir; I wasn't there. The second assistant had the handle of the dials in his hand, and when I came around, I said, "All right," just simply to indicate that I was there.

Q. What engineer was is that heard this; who was there?

A. Mr. Comstock, the second assistant.

Q. The tall young man that was on the witness stand yesterday?

A. Yes, sir.

Q. What were you doing in back of the engine; what work did you do there?

A. Well, it was my place to be there; I was the store-keeper, and I was generally attending to little odds and ends around there; I was usually attending to little odds and ends around when I was not needed on the platform; when the ship was going out and coming in my work was at the dials to pass the word to the engineers.

Q. What business are you engaged in now?

A. I am following the business of marine engineer.

Q Where are you employed?

A. I was employed last on the steamer "Del Norte."

Q. When was that?

A. I left her last Wednesday, a week.

Q. You still have employment with that ship?

A. No, sir.

Q What company does that ship belong to?

A. Messrs. Hobbs & Wall.

A. At the present time you have no employment at all?

A. No, sir; I have no employment at all.

James Swan. Recalled:

By The Court—Q. Will you take the model of the "Chester" and place the rudder in the way in which you last saw it?

A. That was the way, (showing).

By Mr. White—What are you doing now?

A. I am second officer of the "San Bonito" when I am employed; I am in shore just now attending to this case.

Q. You are no longer in the employment of the O. & O. Co.?

A. No, sir.

Captain Metcalfe. Recalled:

By The Court—Q. Captain Metcalfe, what was the order on board the "Chester" that would put the rudder in the position that it was placed in by the last witness?

A. Port.

Q. The order would be port?

A. Yes, sir.

Q. Then your assertion as to the helm of the "Chester" which you have testified about, would be born out by the last witnsss?

A. Yes, sir.

Two maps were hereupon introduced in evidence, and one was marked: "Libellant's Exhibit One," and the other "Respondent's Exhibit One."

Mr. Barnes—If Your Honor please, we have a number of other witnesses, but we consider upon consultation, that their testimony would be purely cumulative, and in view of that fact, we have decided not to introduce any more testimony to the Court and rest the defendant's case.

Mr. White—We have no rebuttal.

(The case was thereupon set for argument for to-morrow morning, Wednesday, August 14th, 1893, at 10 o'clock A. M.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the Court-room, in the City of San Francisco, on Tuesday, the 10th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

Present:

The Honorable Wm. W. Morrow, Judge.

Henry F. Smith and George C. Smith, Infants, by Eliza A. Smith, their Guardian, and Eliza A Smith for herself and as Administratrix of the Estate of Henry Smith, deceased, vs. Occidental and Oriental Steamship Company, a Corporation, &c.,	No. 10,732.

This cause having been heretofore submitted to the Court for consideration and decision, now, after consideration had thereon, the Court renders its opinion, and it is by the Court ordered that libellants have and recover from the respondent, the Occidental & Oriental Steamship Company, the sum of ten thousand dollars, and costs, and further ordered that a decree in conformity herewith be duly drawn and entered.

In the District Court of the United States in and for the Northern District of California.

In Admiralty.

HENRY F. SMITH AND GEORGE C. SMITH, Infants, by Eliza A. Smith, their Guardian, and Eliza A. Smith. for herself and as Administratrix of the estate of Henry Smith, Deceased. Libelants. VS. OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY, a corporation, AND PACIFIC COAST STEAMSHIP COMPANY, a corporation, Respondents	No. 10,732.

AND

ELIZA A. SMITH, Libelant, VS. OCCIDENTAL AND ORIENTAL STEAMSHIP Co., a Corporation, and PACIFIC COAST STEAMSHIP Co., a Corporation, Respondents.	No. 10,733.

Actions seeking damages for loss of life under sections 376 and 377 of the Code of Civil Procedure of the State

of California, alleged to have been sustained through and by the wrongful acts and negligence of respondents.

Clinton L. White and William H. Cobb, proctors for libelants.

W. H. L. Barnes, and Frank Shay, proctors for respondents, Occidental & Oriental S. S. Co.

Morrow, District Judge.

On the morning of August 22d, 1888, between 9 and 10 o'clock, a collision took place in the entrance of the Bay of San Francisco, between the steamships "Oceanic" and "City of Chester." The latter vessel was sunk and became a total loss, and several passengers on board of her lost their lives. Among those were Henry Smith and his daughter, Myrta Smith. Two actions were instituted in this Court against the Occidental & Oriental Steamship Company and the Pacific Coast Steamship Company, owners, *pro hac vice*, of the "Oceanic" and "City of Chester," respectively, as co-defendants, to recover damages for the death of these two persons; one of the suits being brought under section 377 of the Code of Civil Procedure of the State of California, by Eliza A. Smith, as administratrix of the estate of the deceased Henry Smith, for herself, and on behalf of Henry F. and George C. Smith, infants, and children of the deceased, as their guardian, praying judgment for the sum of $75,275; the other suit being brought under section 376 of the same Code, also by Eliza A. Smith, to recover damages for the death of Myrta Smith, an infant daughter of the plaintiff, in the sum of $20,000. These actions were brought originally with a view of the plaintiffs availing themselves of such common-law remedy as this Court could afford by

virtue of the judiciary act; but by stipulation entered into between the parties, and filed September 7th, 1893, it was agreed that these two actions were admiralty causes, *in personam*, and should be treated as such. The causes were thereupon transferred from the common-law to the admiralty side of the Court; all objections and exceptions to the form of such proceeding, or of any proceeding prior thereto, as not being in accordance with the admiralty rules and practice of this Court, being expressly waived. It was further stipulated in open Court that the two causes should be consolidated for the purposes of trial, and that separate judgments might be awarded in the cases.

On the 1st of September, 1890, the Pacific Coast Steamship Company, as charterer and lessee of the City of Chester, filed a petition in this Court for a limitation of its liability under sections 4282–4289, Rev. St. U. S. Thereafter such proceedings were had that a decree was entered giving the Pacific Coast Steamship Company the benefit of a limitation of its liability, and fixing the extent of such liability at $75—the appraised value of a small boat saved from the wreck of the City of Chester. In view of this fact the libelants, on November 9, 1892, dismissed their actions as to the Pacific Coast Steamship Company, and thereupon the liability of the City of Chester was eliminated from the case; but her conduct at and prior to the catastrophe remains for the consideration of the Court, in determining whether or not the libelants are entitled to a judgment as against the Occidental and Oriental Steamship Company, the only remaining respondent.

Thee Oceanic is a four-masted steamer of 3,808 tons register, with a length of 438 feet, a beam of 40¾ feet, and

a draught of 25 feet. She had been engaged in making voyages between the port of San Francisco and the ports of Hongkong and Yokohama. She was thoroughly equipped and appare'ed, completely officered and manned, and in every respect a staunch and seaworthy vessel. On the morning of the collision she was entering the harbor of San Francisco, having just returned from one of her periodical trips to China and Japan. She carried, in addition to her cargo, about 1,000 psssengers. She was leased by the White Star Company to the Occidental and Oriental Steamship Company. The City of Chester was a steamship leased to and operated by the Pacific Coast Steamship Company. She was used in the coasting trade, and at the time was running between this port and that of Eureka, in this State. She had a gross tonnage of about 1,100 tons and a net tonnage of about 850 tons; was about 205 feet in length, 32 feet in beam, and 16 feet in depth. On the morning of the collision she was just proceeding on one of her regular trips, laden with freight and passengers, and was making her way out of this port.

For the purpose of a better understanding of the testimony in the case, it may be well to notice at the outset that the collision involved four possible situations: (1.) The collision may have been the result of inevitable accident, in which event the respondent would not be held liable for the consequences. (2.) The "City of Chester" may have been wholly at fault, and the "Oceanic" blameless, and the respondent therefore not liable. (3.) The "City of Chester" may have been blameless, and the "Oceanic" at fault, and the respondent therefore liable. (4). Both the "City of Chester" and the "Oceanic"

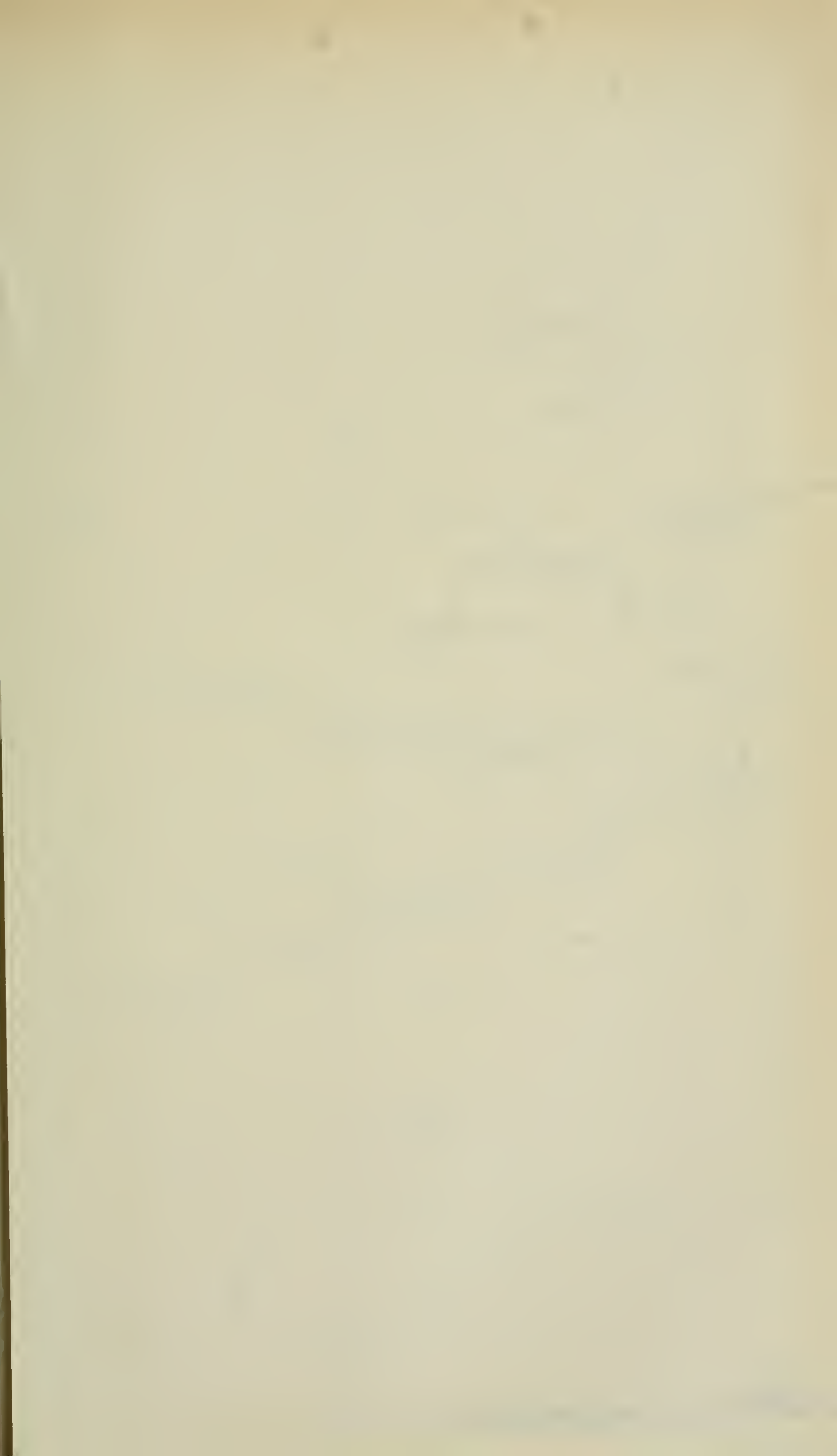
may have been at fault, and the respondent, therefore, liable.

Ward v. The Ogdensburgh, 5 McLean, 622 Fed. Cas. No. 17, 158.

The first situation is not pleaded as a defense, or relied upon, by the respondent. It remains, therefore, for the libelant to establish either the third or fourth situation. The respondent claims that the proofs show that the collision took place notwithstanding the "Oceanic" endeavored, by every means in its power, with due care and caution, and a proper display of nautical skill, to prevent the disaster. Reducing the controversy to its simplest terms, for the present purpose, it may be stated briefly, that the libelants claim that both the "City of Chester" and "Oceanic" were at fault, as indicated in the fourth situation, and the respondent contends that it is excused because the "Oceanic" was not at fault, as indicated in the second situation.

The collision took place between half-past 9 and a quarter of 10 on the morning of August 22, 1888, at the inner entrance to San Francisco bay, known as "Golden Gate Channel." It occurred at some point between Fort Point and the land opposite, known as "Lime Point." The precise locality, owing to the fog then prevailing, and the conflicting testimony on that point, is somewhat involved in doubt, and can only be determined approximately. For a better understanding of the locality, and the movements of the two vessels, reference may be had to the accompanying map:

The width of the channel, where the collision took place, is stated to be about seven-eighths of a nautical



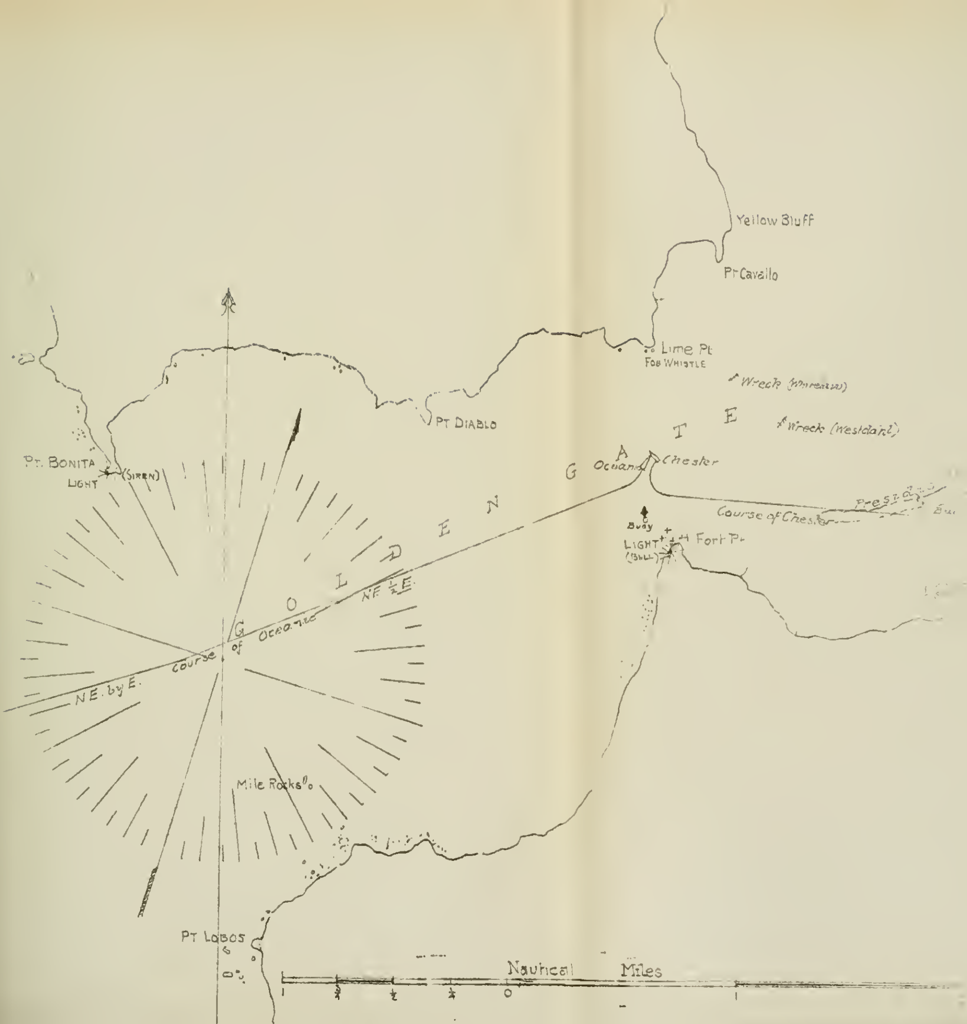
may have been at fault, and the respondent, therefore, liable.

Ward v. The Ogdensburgh, 5 McLean, 622 Fed. Cas. No. 17, 158.

The first situation is not pleaded as a defense, or relied upon, by the respondent. It remains, therefore, for the libelant to establish either the third or fourth situation. The respondent claims that the proofs show that the collision took place notwithstanding the "Oceanic" endeavored, by every means in its power, with due care and caution, and a proper display of nautical skill, to prevent the disaster. Reducing the controversy to its simplest terms, for the present purpose, it may be stated briefly, that the libelants claim that both the "City of Chester" and "Oceanic" were at fault, as indicated in the fourth situation, and the respondent contends that it is excused because the "Oceanic" was not at fault, as indicated in the second situation.

The collision took place between half-past 9 and a quarter of 10 on the morning of August 22, 1888, at the inner entrance to San Francisco bay, known as "Golden Gate Channel." It occurred at some point between Fort Point and the land opposite, known as "Lime Point." The precise locality, owing to the fog then prevailing, and the conflicting testimony on that point, is somewhat involved in doubt, and can only be determined approximately. For a better understanding of the locality, and the movements of the two vessels, reference may be had to the accompanying map:

The width of the channel, where the collision took place, is stated to be about seven-eighths of a nautical



Yellow Bluff
Pt Cavallo
Lime Pt
Fog Whistle
Wreck
Wreck
Pt Diablo
Pt. Bonita
Light
(Siren)
G O L D E N G A T E
Chester
Course of Chester
Buoy
Light
(Bell)
Fort Pt
NE ½ E
Course of Oceanic
NE. by E.
Mile Rocks
Pt Lobos
Nautical Miles
1
¾
½
¼
0
1

mile, or, by chart measurement, about 5,200 feet. It is the narrowest point in the channel, and the whole body of water is navigable almost from shore to shore. The sea, on the morning, was calm. The tide was flood. The pilot on the "Oceanic" fixes low water at 6:15 in the morning. Ferdinand Westdahl, of the coast and geodetic survey, fixes low water, by the tide tables, at 5:53. The difference is immaterial. At the time of the collision the flood tide had been running in for about three hours and a half, or nearly four hours. The testimony shows that in entering the channel the young flood tide makes in along the south shore, striking the land just outside of Fort Point, and from there deflects, and sheers off across the channel, nearly due north, towards Lime Point, until it reaches about mid-channel,—sometimes beyond it, depending upon the force of the current,—where it resumes the same course as the true tide coming in mid-channel. The evidence shows that there is a tide rip of considerable force from Fort Point to mid-channel, deflecting the course of vessels entering it, and making it necessary that in crossing the current outward, they should starboard their helms, to make the rip and preserve their courses.

The testimony presents an irreconcilable conflict as to the place of collision. The evidence introduced by the libelants in relation to the outward course of the City of Chester along the south shore of the bay, the distance and bearing of objects on the shore, and the location and effect of the crossing tidal current near Fort Point, would fix the place of collision at a point considerably south of mid-channel. On the other hand, the evidence introduced by the respondent in relation to the inward course of the

"Oceanic" along the north shore to the entrance of the harbor, and the distance and bearings of points on shore, would fix the place of collision some distance north of mid-channel. These two points would be about 3,000 feet apart. It is manifest, therefore, that if these two vessels were pursuing the course indicated by the testimony relating to each, a collision was impossible; but a collision did occur, and for the purpose of understanding the movements of the two vessels at and prior to the collision it becomes necessary to determine as near as possible the place of its occurrence.

The course claimed by the pilot and captain of the "Oceanic" is, briefly, as follows: The "Oceanic" had arrived off the entrance to San Francisco bay early on the morning of August 22, 1888. She made for the whistling buoy, where the pilot grounds are situate, near which she took up the pilot, Louis Meyer, about 8 o'clock. The pilot steered the vessel in for the whistling buoy, which was picked up and passed on the north side, according to the testimony of the pilot, about 1½ miles off, and, according to that of the captain, about a half a mile away. It was there that the course of the "Oceanic" was first shaped northeast by east for the entrance. The weather as stated above, was foggy; densely so at times, and less so at others. The sea was calm. The pilot and captain consulted together as to the advisability of entering the harbor under the conditions then prevailing. They deemed it safe to make the attempt, taking adequate precautions, in proceeding at a very slow rate of speed, blowing the fog whistle, and keeping a sharp lookout. About mid-way between the whistling buoy and Point Bonita,

they passed the ship "Lord Wolseley," which was lying at anchor somewhat north of mid-channel. A tug had just come up, and was preparing to tow her in. The pilot states that he "steered a little towards her," and asked the master of the tow boat the kind of weather there was inside, but the answer, on account of the distance between them, could not be understood. The master of the tug fixes the distance at which the "Oceanic" hailed him as, approximately, a quarter of a mile. Proceeding on, Point Bonita, or, as it is sometimes called North Head, was passed about a half a mile off. According to the testimony of the pilot and captain, its form was just perceptible to the naked eye, although Tillston, the first officer, who was on the lookout, states that he did not see it. At this point the engines were put "dead slow," which meant a speed of about four knots an hour,—just enough to give her steerage-way. At the same time the course of the vessel which hitherto had been N.E. by E., was altered one-half point to the N., making it N. E. ½ E. Point Bonita, as testified by Pilot Meyer, was made about 9:19 o'clock. It was then that the two orders just referred were given—one to the engineers to go "dead slow," and the other to the wheel, to port half a point. Point Diablo was passed eight minutes later, as fixed by the pilot. The same rate of speed, "dead slow," was maintained all this time. Point Diablo could be more clearly discerned than Point Bonita. The witnesses state that it was all the way from a quarter to a half a mile. It was between these two points—in the neighborhood of Point Bonita—that the pilot and officers of the Oceanic first detected the fog whistle of an outcoming

steamer. The direction from which the sound of the whistle proceeded indicated that the approaching vessel was some three points on their starboard bow; that she was on the inside of the harbor and had not reached the channel; and furthermore, that her course with relation to that of the Oceanic did not seem to change materially. After passing Point Diablo, as the fog signals of the approaching vessel grew more pronounced, a sharp lookout was kept off the starboard bow. Presently the Captain of the Oceanic discovered the dark mass of a hull looming up in the fog about two and a half to three points on his starboard bow. Tillston, the first officer, who was stationed at the bow, on the lookout, had also discovered the presence of the vessel, which proved to be the City of Chester, and had communicated that fact to the bridge The first officer fixes the distance between the two vessels when he first discovered the City of Chester as between 600 to 800 yards (1,800 to 2,400 feet); the pilot, at about a half a mile; the Captain, at about a half a mile. Bridgett, the second officer, who was on the bridge, estimates the distance as also about a half a mile. Swan, the third officer, who was at the helm, places the distance when he first saw her at also about a half a mile. The position of the City of Chester with reference to the Oceanic was two and a half to three points on the starboard bow of the latter, the former vessel's bow pointing directly amidships of the Oceanic. Captain Metcalfe testified: "She was heading right for us, straight; all masts and funnel in line. If anything, we could see probably a little more on the starboard bow." "I should say she was on our starboard bow. She was end on to us. We were never at any time

end on to her." "She was so nearly end on that you might call it end on." "Heading right for our bridge apparently." Immediately upon seeing the form of the City of Chester emerging through the fog the order was given by the pilot to blow two whistles, indicating that the Oceanic would go to the left. At the same time the helm was put hard astarboard. Tillston heard the order given. Bridgett did also. Captain Metcalfe testifies that the helm was put hard astarboard at the same time the first signal was given, and he says further: "The ship, not having much way on her, turned gradually and slowly to port," Again he says: "The ship was going at very slow speed, and naturally she took a long time to move. She did move to the left, but how much I cannot say—not sufficient to endanger the ship going onto the shore." The question being asked, "Is that a factor in it—the fact of her going dead slow?" he answered: "She would take much longer to do it; that is all." Q. But not any more water? A. I don't know that she would. It is only an assumption on my part. As I have told you, we never experimented." He says further: "The helm having been starboarded, the ship altered her course probably a point or a point and a half to the north." The City of Chester answered these two whistles of the Oceanic almost immediately after. She blew two whistles, as indicating that she acquiesced in the proposed maneuver and would do the same. But it appears, as we will discover later on, that the City of Chester had not yet caught sight of the Oceanic, nor did she do so until a collision was unavoidable. The Oceanic, as stated above, answered her helm but slowly. The course of the City of Chester did not

seem to change to the left to any appreciable degree, as it should have done. On the contrary, as the vessels approached she seemed to swing to the right. She was watched closely by the pilot and Captain of the Oceanic. A short time expired, fixed at about two minutes by the witnesses, during which the vessels were approaching each other all the time; and it was observed by those on the Oceanic that the City of Chester was going gradually to the right instead of to the left. In view of this fact, the pilot gave a second order to blow two whistles, which was immediately acknowledged by the City of Chester with two, also. The pilot and the Captain of the Oceanic, finding that after the second signal had been assented to by the City of Chester she still failed to respond to her starboard helm and to alter her course as she had promised to do, gave the order to go full speed astern. Then the collision was a foregone conclusion. The engines were full speed astern for a very brief time—about two or two and a half minutes—overcoming in some degree the forward speed of the Oceanic, which was about four knots, exclusive of the flood tide, when that vessel crashed into the City of Chester on the latter's port side, some twenty feet abaft her bow, penetrating to a dis- of about ten feet, or about one-half the beam. The engines of both vessels were stopped, and the Oceanic was kept impaled in the breach she made in the City of Chester so as to keep the latter vessel, which was filling fast with water, afloat. The boats of the Oceanic were immediately lowered, and every effort was made by the officers and crew of the Oceanic to save life. Both vessels, while thus impaled, drifted with the tide towards the inside of the

entrance. They drifted for some five or six minutes, when, finding that the City of Chester could no longer be kept afloat, the Oceanic backed a little and the City of Chester sank.

The course and maneuvers of the City of Chester, as testified to by her Captain, officers and passengers, was substantially as follows: She left Broadway wharf about 9 o'clock on one of her periodical trips to Eureka, and was put under full speed, which was about ten knots. On account of the fog which prevailed to the north, Captain Wallace followed rather closely the south shore of the bay, passing, as he says, about 150 feet inside of Presidio Shoal buoy. About here he commenced to enter the fog—hitherto he had been running on the edge of it—and, as the vessel penetrated further, "it got very thick." He states that he ran into the fog about half way between the Presidio Shoal buoy and the Fort. He testifies that he steered the usual course to clear the Fort. Upon entering or just after having entered the thick fog, the steamer was slowed down to half speed. Either before or almost immediately after this order had been communicated to the engineer in charge, two whistles of an approaching steamer were heard off the starboard bow. The Captain responded with two, signifying that he would go to port, thus acceding to the proposed maneuver. The helm of the City of Chester was then placed hard astarboard to conform to the signal. At this time he had not seen anything of the Oceanic, but he had heard her fog signals for some time previously; in fact, he did not obtain sight of the Oceanic until after the second signal had been answered by him. He testifies that a good lookout was being kept. Lun-

dine, the second officer, was on the lookout, and supplements the Captain's testimony that the Oceanic was not seen until after the second signal to go to port had been answered by the City of Chester. The time is approximated at less than a minute after the second signal. The reason assigned by the Captain for not seeing the Oceanic before, was the thickness of the fog: "It was so foggy we couldn't see her." After the first interchange of signals, the City of Chester proceeded a little further on, her speed not being checked, when the Captain heard the approaching vessel blow two more whistles—a repetition of the signal to go to port. He answered these, also, with two, indicating his assent. Almost immediately after—certainly less than a minute as fixed by the Captain—he caught sight, for the first time, of the Oceanic. She loomed up out of the fog one and a half or two points now on his port bow. He immediately saw that a collision was inevitable, and rang the indicator full speed astern, and let the flood tide take her bow, her stern being still in the eddy, and let her swing right around. In less than two minutes from the order to go full speed astern, the Oceanic ran into the City of Chester on the latter's port side, about twenty feet from her bow, penetrating a distance of about ten feet, as before stated. As soon as the concussion took place the engines were stopped. The vessel filled rapidly, and, after drifting for some five or six minutes, sank at some distance from the place of collision.

It will be noticed that these two sets of narratives agree substantially with each other as to what took place at, and just previous to, the collision. In fact, on most points, excepting, notably, the place of collision, they are corro-

borative of each other. There is no conflict as to which vessel first became apprised of the other's presence,—that the "Oceanic" first sighted the "City of Chester," while the latter did not see the former until after the second signal had been exchanged, and the collision was inevitable. There is no real conflict as to the relative positions of each vessel when they first became aware of each other's proximity,—that the "City of Chester" was on the "Oceanic's" starboard bow from 2½ to 3 points. There is no contradiction as to the signals exchanged, and the measures adopted by both in pursuance of such signals, that the "Oceanic," having first caught sight of the "City of Chester," with that vessel on her starboard bow, took the initiative, and elected to starboard her helm, and go to port; that she gave the required signal, of two whistles, to communicate such election, which was assented to by the "City of Chester" with two whistles; that both vessels thereupon placed their helms hard astarboard; that the "Oceanic" answered her helm but slowly, while the "City of Chester" did not respond to hers at all, on the contrary, went to starbord instead of to port; that the "Oceanic," perceiving that the "City of Chester" did not take the course agreed upon, gave a second signal, of two whistles, to go to port, which the "City of Chester" likewise answered with two whistles, indicating that she would do so; that almost immediately after the second signal the "City of Chester," for the first time, caught sight of the "Oceanic," and that then that vessel was 1½ or 2 points on the former's port bow; that then, both seeing that a collision was inevitable, went full speed astern for 1½ or 2 minutes; that the effect of full speed astern with the helm

hard a-starboard was to throw the bows of both vessels to the right, particularly the "City of Chester," which had the flood tide against her port bow; that when the order to reverse was given the "City of Chester" was either in the tide rip, or was just entering it; that the vessels came together nearly at right angles, the "City of Chester" heading northerly, and the "Oceanic" easterly; that the "Oceanic" ran into the "City of Chester" on the port bow of the latter, some 20 feet abaft the port bow, and penetrated about one-half of the beam of that vessel; that both vessels thus impaled, drifted towards the inside of the entrance, with the flood tide, for about five or six minutes, when the "City of Chester" could no longer be kept afloat, and sank. About all these facts there is no dispute. What may seem apparent contradictions are readily explained. But as before stated, there is an irreconcilable conflict as to the place of the collision. The respondent claims that the collision took place nearer to the north than to the south shore, and fixes the distance as about a quarter of a mile from Lime Point, in a southerly direction, while the captain, officers and passengers of the "City of Chester" fix the collision as having occurred near Fort Point,—the point opposite Lime Point,—the captain estimating that the collision took place from 600 to 650 feet from Fort Point, nearly due north from that point about one-eighth of a mile. The course pursued by both vessels anterior to the collision would be important factors in determining the locality of the collision. But the testimony on this point, instead of assisting the Court, only involves the question with more perplexity; for, according to the testimony of the pilot and officers of the "Oceanic,"

the course pursued, or intended to be followed, by this vesssei in entering the harbor, would have been along the north shore of the channel, and would bring the vessel to the point of collision as fixed by them, viz., about one-quarter of a mile from Lime Point; while, on the other hand, according to the testimony of the captain of the "City of Chester," the latter vessel hugged the south shore on account of the fog. The captain of the "City of Chester" states that he steered the usual course to clear Fort Point, and fixes the place of collision, as above stated, at about 600 to 650 feet off Fort Foint,—north, or nearly so. Had both vessels pursued, up to the time of the collision, the course said to have been followed by each they would certainly have cleared each other by at least a half a mile. But the fact remains that a collision did take place, and it is certain that either or both accounts of the courses steered, with reference to the place of collision, must be incorrect.

The pilot, Captain and officers of the Oceanic testify to a course steered by that vessel, tracing it from the time when the pilot headed the vessel N. E. by E. for the entrance until the time of the collision, the object of which is to show that they brought the vessel in north of mid-channel, and that their line of progress, as delineated on the map introduced by counsel for respondent, is directly in the line with the place of collision as fixed by them. They seek to do this by describing a course pursued by the Oceanic from the whistling buoy, and by estimating the distances at which that vessel was when off to the northward of the whistling buoy and the distances at which Points Bonita and Diablo were passed. This method

of ascertaining the place of collision would be of value if the distances were accurately estimated. The difficulty is that the witnesses themselves do not agree as to the distance of the Oceanic from the whistling buoy when her course was first shaped for the entrance, nor do they agree as to the distances at which Point Bonita and Point Diablo were passed. Pilot Meyer testifies that when he first shaped the course of the Oceanic N. E. by E. for the entrance he was about one and a half miles northeast of the whistling buoy, while Captain Metcalfe fixes the same distance as about a half a mile. Both witnesses had equal powers of observation so far as the evidence shows. Making due allowance for the fact that both estimates were approximations, under somewhat difficult conditions in view of the prevailing fog, yet the discrepancy is not reconcilable. The same infirmity exists as to the estimates of the distance at which the witnesses claimed that they passed Points Bonita and Diablo. The pilot and Captain Metcalfe swear that Point Bonita was passed about one-half of a mile off; that they could see the loom of it through the fog; while Tillston, the first officer, who was on the lookout, states that he did not see Point Bonita. As to the distance at which one could see, he testifies: "Before we got to Point Bonita I should say we could see fully a quarter of a mile, as we passed a big sailing ship lying at anchor. As we got inside from Point Bonita it cleared away, and I imagine I could see half a mile, and so it continued up to the time of collision." It was on passing this point that the course of the Oceanic was altered one-half a point to the north, and the pilot says: "With that course we made Point Diablo very plain—

not more than from one-quarter to one-half a mile." Captain Metcalfe says they could see Point Diablo pretty well. On the other hand, first officer Tillston, who was all this time on the lookout, says he could just see the loom of Point Diablo, and being asked to fix the distance, says, "I should imagine from the state of the fog that it would be one-quarter of a mile." These inconsistancies do not command to the Court the accuracy of the course claimed by counsel for respondent as the true one, and as going to show that the collision must have occurred where they claim it did, viz: about one-quarter of a mile south from the north shore or Lime Point. This contention is not only flatly contradicted by Captain Wallace and opposed to the testimony of the officers and passengers on board the City of Chester, who agree in fixing the place of collision as at some point near Fort Point, and certainly south of mid-channel, but by the testimony of the pilot of the Oceanic, himself, it is very questionable whether the collision occurred as far north of mid-channel as the testimony of Captain Metcalfe and of the second officer, Bridgett, would have it. He (the pilot) testifies as follows:

" Q. As near as you understand the position of the " Oceanic, you were north of mid-channel? A. Yes, " sir. Q. This is the position that you put the Oceanic " in at the time of the collision? A. Yes, sir. Q. " About how far would that place be where the collision " occurred from mid-channel? A. It must have been " very near. Q. Very near mid-channel? A. She " must have been very near mid-channel. Q. Then you " you were coming in very near mid-channel? A. No,

"sir; the Chester. I was on the north side. Q. We "will agree to this, that the Oceanic was here when the "collision occurred (pointing). A. Yes, sir. Q. Now, "I want to know how far this point of collision is from "mid-channel? A. Pretty close."

The witness subsequently states that they were a quarter of a mile from the north shore. But this testimony is plainly inconsistent with the statement cited above. It is to be observed, further, that Captain Metcalfe testifies that when he first sighted the City of Chester she was about one-half a mile off, and the Oceanic was then about one-quarter of a mile from Lime Point. He was asked how it was that, having his helm hard a starboard, he avoided running into the north shore, when he was only a quarter of a mile away from it, and the City of Chester was a half a mile distant; and he answered by saying that the Oceanic was going at a very slow rate of speed, and naturally took a long time to move. She did move to the left, but how much he could not say,—not sufficient to endanger the ship going onto the shore. This reply is susceptible of one or two constructions: Either he was much further toward mid-channel, or to the Fort Point side of mid-channel, than he himself was willing to admit, or else the Oceanic was so slow in answering her helm as to be unwieldy. The captain says that he could see the white fog signal on Lime Point landing plainly, and second officer, Bridgett, fixes Lime Point when the collision took place at less than one-fourth of a mile away. But, on the other hand, Captain Wallace of the City of Chester is equally positive of his statements, and estimates the distance of the collision from Fort Point at

600 to 650 feet nearly north of that place. He testifies as follows:

"Q. How far off from the south shore did this collision "occur? A. From Fort Point, do you mean? Q. Yes, "from Fort Point—from the south shore? A. Well, "there is 150 feet off the buoy. Probably about from "600 to 650 feet off Fort Point. Q. In what direction? "A. North; nearly north. Q. Had you or hadn't you "passed the buoy? A. No, sir; we hadn't passed the "buoy."

Subsequently Captain Wallace states that although the fog was very thick around Fort Point, he saw this buoy just when the Oceanic loomed up. He states that it was 100 or 150 feet on his port bow.

The other witnesses who testify that the collision took place south of mid-channel, or near Fort Point, do not pretend to fix, with any degree of accuracy, the place of collision. The passengers who testified—those who are disinterested as well as those who might be supposed to have an interest in the result of the case—agree that it was south of mid-channel, but exactly where does not appear. Furthermore, it is to be observed that their estimates of distances are subject to the same objection pointed out in commenting on the testimony of the pilot, captain and officers of the Oceanic. They are all approximations, given under the difficult conditions attending observations in a thick, drifting fog.

Charles McCullom, the first officer of the City of Chester, testified that it was clear until they got opposite to the Presidio; that then he went below. On hearing two whistles, and those followed by two more, he came up on

deck, and then the Oceanic was about fifty feet away. As to the place of collision, the witness says that when he came up he could not see land on either side. He guesses that both of the vessels were nearer Fort Point than Lime Point.

John Lundine, the second officer of the City of Chester, who was stationed at the bow of this vessel, states that upon hearing the whistles, which was some few minutes previous to the collision, they were not quite up to Fort Point, but pretty close to it. He does not know the position of the City of Chester exactly. He says that he didn't notice how far from the south shore they were. He could see the south shore, but whether he saw it directly south he does not say. But he testifies that if they had gone along their old course they would have been within a ship's length of the buoy. This witness does not seem to have taken particular notice of the place of collision.

Rufus Comstock, the second engineer, states that the first land he noticed after getting into one of the Oceanic's small boats, was Fort Point. As to the distance, he says:

"I didn't notice exactly, but I know that we were not "very far. I shouldn't think it could have been a quar- "ter of a mile. I don't think it was over a quarter of a "mile. I know that we were pretty close into Fort Point "buoy—must have been at the time of the collision."

This fact he noticed about five or six minutes after the collision.

James Rankin, the keeper of the Fort Point lighthouse, at the time of the collision was about 200 feet from the extreme point of the Fort; 200 feet due south; up on the high ground; on the bluff. He states that he did not see

the collision (he could not on account of the fog), but gives his impression as to the respective courses of each vessel by means of the whistles; first their fog signals and then their double whistles to go to port. From the sound of these he judged that they were coming close to Fort Point, and, apprehensive that something serious would result, he paid close attention. He says he heard the crash. The weather at the time of the collision was very thick. He could not see the flagstaff on the Fort—not even the Fort itself. He does not pretend to be able to fix exactly, or at all, except in a general way, the place of collision. He testifies: "I would judge, drawing a line "from Fort Point to Lime Point, it to be one-third of the "distance across, and about one-quarter of that distance "towards the city."

Clitus Barbour, a passenger on board of the City of Chester, says that he could not tell exactly where the collision occurred, but he thinks they were nearly off Fort Point. He says they drifted some distance down the harbor in a small boat. He refers to the fact that in passing the Presidio he could see the buildings, wharf, etc., and says that if there was any fog it was out beyond. As to the relative distance between the two shores where the City of Chester went down after having drifted for five or six minutes, he says: "My own notion was— It is somewhat confused in my mind, but it appeared to me further to the Saucelito shore than it was to this shore."

The effect of the flood tide appears to have some bearing in determining the place of collision. The tide rip near Fort Point is caused by the cross current of the flood tide. That the City of Chester was in this tide rip, or was just en-

tering it, is almost certain. This is attested by two facts: First, the fact that the vessel failed to answer her starboard helm and went to starboard instead of to port. The testimony shows that the tide was running at about a five-knot speed at this point, and that it sets so strongly across the entrance towards mid-channel that vessels, in order to make the rip, starboard their helms. In other words, the natural sheer of the tide would be to carry a vessel to the right or towards mid-channel. Captain Metcalfe thus states the influence which the flood tide has on vessels about to cross it in that locality: "If her helm had been starboarded then, which is usually done by every steamer going out of the port on flood tide in order to make that rip, she would have recovered herself very quickly and gone on about her business." Therefore, the fact that the City of Chester failed to respond to her starboard helm, in view of the positive testimony of her Captain that he placed her helm hard astarboard and kept it there from the very first signal, is accounted for or explained by the force and action of this tide rip upon vessels crossing it. Again, the rapidity with which the City of Chester was turned to the right when her engines were placed full speed astern is also explained by the action of the tide rip. The very fact that the vessels collided almost at right angles—the Oceanic running into the port side of the City of Chester some twenty feet abaft her bow—when, some two minutes before the collision, the Oceanic had the City of Chester on her starboard bow, indicates that the force of the current must have been an efficient cause in thus radically changing the positions of the vessels. The additional fact that the Oceanic, in going full speed astern

with her helm hard astarboard, the result of which combination would be to send her to the right, while the fact was that she did not turn very much in that direction, as compared with the turn which the City of Chester made, action on the part of the Oceanic attributable to the force of the current she had to contend against, indicating that she was also in or near the tide rip or cross current.

Considerable stress is laid by both sides upon the testimony of T. P. H. Whitelaw, called for the respondent, and F. Westdahl, called for the libelants, as both of these witnesses undertake to fix exactly the place where the wreck of the Chester was found. T. P. H. Whitelaw, engaged in the business of wrecking, testifies that on the day of the collision he went to ascertain where the Chester lay. He states that he found where she was by oil coming up to the surface of the water, and made a mental note of the bearings of the wreck. Some two years after he went out, accompanied by Bridgett, the second officer of the Oceanic, to ascertain again the position of the wreck. He says that the only bearings he had to go by were those which his memory afforded him from his investigations on the day of the collision. Using these, he states that he struck the wreck at the first sounding. She was then situated about three-fifths of the distance towards Lime Point, somewhat towards the inside of the harbor; that is two-fifths of the distance from the north shore and three-fifths from the south shore, or Fort Point.

Ferdinand Westdahl, a master mariner connected with the United States coast and geodetic survey, made investigations to ascertain the position of the wreck.. He experimented by drifting with a tug on a flood tide, to fix

upon the approximate place of the wreck. He made three drifts, starting approximately from where Capt. Wallace fixed the place of collision. Each drift brought him close to mid-channel, and considerably inside of the harbor. With this data, he searched for the wreck. He says:

" He swept along the bottom with a line weighted with
" grate bars and window weights until we finally caught
" on to what we supposed was the City of Chester,—the
" wreck of her. I determined where she was then, or
" what we supposed was the City of Chester,—where it
" lies."

He located the wreck very nearly in mid-channel, while Whitelaw fixes the location of the wreck further to the north, but not quite so far inward. Respondent claims that Whitelaws location must be correct, because it is more in the line of progress of the course of the Oceanic up to the time of the collision than that of Westdahl. It is not denied that the Oceanic and City of Chester, while impaled, drifted for some distance inward, on the flood tide, in the short space of five or six minutes. There were several forces which undoubtedly operated to finally deposit the wreck of the City of Chester at a point to the northward and eastward of the place of the collision. The City of Chester was, at the time of the collision, going nearly straight across the channel, and the Oceanic was coming nearly straight across the channel, and the Oceanic was coming in on a course N.E. ½ E., with her helm hard a-starboard. The point of collision was at the bow of the Oceanic, and near the bow, and on the port side of the City of Chester. The force of the collision was such that

the bow of the Oceanic cut into the City of Chester about 10 feet, or about halfway through the vessel. This propelling force was therefore inward and northward. The flood tide of Fort Foint sheers across the entrance towards mid-channel, and then flows inward on nearly a straight course. This force was first northward, and then inward. In view of these conditions, we should expect to find the wreck of the City of Chester to the north and inward of the place of collision, and hence it is that we infer that the collision took place near mid-channel; but since we cannot hope to fix the place of collision with absolute certainty, it does not seem necessary to determine which of these two wrecks shall now be considered the remains of the City of Chester.

After a careful examination of all the evidence, aided by the inferences arising out of the natural probabilities attending the situation, I have reached the conclusion that the collision took place somewhere near mid-channel, but nearer Fort Point than Lime Point. This determination necessarily places the inward course of the Oceanic a little to the south of that delineated on the chart or map introduced by the respondent; but it is a course that accounts for the collision in accordance with what appears to me to be the established facts in the case, and particularly the actions of the two vessels.

The point of collision having been established as nearly as possible, we proceed now to consider the conduct of the two vessels and the law of the road applicable to their movements. Section 2360 of the Political Code of this State provides the following rule of navigation:

"When steamers meet, each must turn to the right, so as to pass without interference."

Section 970 of the Civil Code provides as follows:

"(1) Whenever any ship, whether a steamer or "sailing ship, proceeding in one direction, meets another "ship, whether a steamer or sailing ship, proceeding in "another direction so that if both ships were to continue "their respective courses, they would pass so near as to in-"volve risk of collision, the helm of both ships must be "put to port so as to pass on the port side of each other. "(2) * * * (3) A steamer navigating a narrow "channel must, whenever it is safe and practicable, keep "to that side of the fairway or mid-channel which lies on "the starboard side of the steamer. (4) A steamer, "when passing another steamer in such channel, must "always leave the other upon the larboard side. (5) "When steamers must inevitably or necessarily cross so "near, that by continuing their respective courses there "would be a risk of collision, each vessel must put her "helm to port, so as always to pass on the larboard side "of each other."

Both vessels elected to violate these rules, and attempted to pass each other starboard to starboard, and a collision was the result. As the Oceanic was the first to depart from the rules, she took the risk of passing in safety; and, failing in the movement, the law holds her in fault. The Columbia, 29 Fed. 716; The Rockaway, 38 Fed. 856, affirmed 43 Fed. 544; The Garden City, 38 Fed. 860; the Titan, 44 Fed. 510, affirmed 49 Fed. 479, 1 C. C. A. 324; the Clara, 49 Fed. 768. But the argument of counsel having been directed more particularly to the

rules provided in the Act of Congress, of March 3d, 1885, prescribing "Revised International Rules and Regulations for Preventing Collisions at Sea," we will proceed to consider the movements of the vessels with respect to these rules. Article 16 of these rules provides as follows:

"If two ships under steam are crossing so as to involve "risk of collision, the ship which has the other on the "starboard side shall keep out of the way of the other."

Article 18 provides:

"Every steamship, when approaching another ship so "as to involve risk of collision, shall slacken her speed, or "stop and reverse, if necessary."

Article 19 provides:

"In taking any course authorized or required by these "regulations, a steamship under way may indicate that "course to any other ship which she has in sight by the "following signals on her steam whistle, namely: One "short blast to mean, 'I am directing my course to star- "'board;' two short blasts to mean, 'I am directing my "'course to port;' three short blasts to mean, 'I am going "'full speed astern.' The use of these signals is optional, "but if they are used the course of the ship must be in "accordance with the signal made."

Article 21 provides:

"In narrow channels every steamship shall, when it is "safe and practicable, keep to that side of the fairway or "mid-channel which lies on the starboard side of such "ship."

Article 22 provides:

"Where, by the above rules, one of two ships is to keep "out of the way, the other shall keep her course."

Article 23 provides:

"In obeying and construing these rules, due regard "shall be had to all dangers of navigation, and to any "special circumstances which may render a departure "from the above rules necessary in order to avoid imme- "diate danger."

When the Oceanic discovered the City of Chester coming out of the harbor, the former had the latter on the starboard bow, and, under Article 16, the Oceanic was bound to adopt such a course as would enable her to keep out of the way of the City of Chester, while the latter was entitled to keep her course. The Oceanic had ample opportunity to "keep out of the way" of the approaching City of Chester, had she acted in due season. There were no impediments to any maneuver she might have seen fit to make, if these had been carried out at the proper time. The testimony shows that the whistles—the fog blasts—of the City of Chester, when first heard, indicated that she was some three points off the starboard bow of the Oceanic. As the vessels approached, the repeated fog blasts from the City of Chester confirmed that vessel's position and bearing with respect to that of the Oceanic, and, furthermore, indicated that the City of Chester seemed to maintain about the same course and continued to head in the direction of a point amidships of the Oceanic. Such is the testimony of the pilot, captain and officers of the Oceanic; and it is an undisputed fact that when the City of Chester was first sighted, her position with relation to the Oceanic was exactly what these witnesses, guided solely by the sound of the fog blasts of the City of Chester, had determined it to be, viz.: Two

and one-half to three points off the Oceanic's starboard bow, heading for amidships. The signals were first heard off Point Bonita, perhaps shortly after that point had been passed. They continued to be heard, increasing in distinctness as the vessels approached each other. These fog signals from the City of Chester were timely notice to the Oceanic to be on guard against the danger of a collision. The situation certainly called for the utmost caution; and while it may be said that the Oceanic, proceeding " dead slow," was not required under the circumstances, to do anything more until the City of Chester should come in view, and her course ascertained, nevertheless the Oceanic should have been prepared by these warnings for immediate action as soon as the dangerous proximity of the City of Chester had been discovered. But was the Oceanic proceeding dead slow? Pilot Meyer says they were abeam of Point Bonita at 9:19, when the order to go dead slow was given. Eight minutes later, he says, they were a quarter of a mile off Point Diablo. These two points are about 1½ miles apart. To traverse this distance in eight minutes requires a speed of more than 10 knots an hour, and yet the pilot tells us that, in going dead slow, he was making 3 to 4 knots through the water without regard to the effect of the tide, and that the tide was running 2 or 3 knots. The greatest possible speed, he admits, is therefore not more than seven knots over the ground. That the Oceanic was proceeding at a higher rate of speed than this is confirmed by the testimony of Allen, the cheif engineer of the Oceanic. He says that at 9:14 they were going dead slow, and 11 minutes later they went full speed astern. Captain

Metcalfe testifies that when the City of Chester was sighted by the Oceanic the latter vessel was about a quarter of a mile from Lime Point, probably then to the southwest of that point; but, from other testimony, it appears it was not until the vessel was directly off Lime Point that the order was given to go full speed astern. The distance between Point Bonita and Lime Point is more than two miles. To traverse this distance in 11 minutes would require a speed of more than 13 knots an hour. But allowing for possible errors in bearings, and reducing the distance to two miles from Point Bonita to the place where the order was given to go full speed astern, and we still have a speed of more than $10\frac{3}{4}$ knots per hour. Had this vessel been going over the ground at the rate of seven knots per hour—her highest possible speed at that time, according to the pilot—she would have required 12 minutes to pass from a point directly abeam of Point Bonita to a point directly abeam of Point Diablo, and more than 17 minutes to pass from Point Bonita to the place where the order was given to go full speed astern. It is plain, therefore, that either the Oceanic was going at a higher rate of speed than has been admitted by her officers, or the interval of time between the orders to go dead slow and to reverse was greater than that stated by the witnesses. The Oceanic was, in my opinion, proceeding along the mid-channel, aided by its strong current. That she was going at a higher rate of speed than dead slow is established by the fact that, although she reversed a few minutes before the collision, she drove her bow into the City of Chester some 10 feet, or about one-half the latter's beam. That this force was not all the effect of the flood

tide is proven by the fact that both vessels were practically in the same current, and the City of Chester was also acting under an order of reverse.

Article 13 of the Act of March 3, 1885, providing "Revised International Rules and Regulations for Preventing Collisions at Sea," is as follows: "Every ship, whether a sailing ship or a steamship, shall in a fog, mist or falling snow go at a moderate speed." In the case of the Normandie, 43 Fed. 156, Judge Brown, of the Southern District of New York, says that—

"What is 'moderate speed' is largely a question of cir-"cumstances, having reference to the density of the fog; "the place of navigation; the probable presence of other "other vessels likely to be met; the state of the weather, "as affecting the ability to hear the fog signals of other "vessels at a reasonable distance; the full speed of the ship "herself; her appliances for rapid maneuvering, and the "amount of steam power kept in reserve, as affecting her "ability to stop quickly after hearing fog signals."

A great many cases have been before the Courts, involving the question of what is a moderate speed in a fog; but it will not be necessary to review these cases, since for the present purpose the rule applicable to the situation under consideration may be briefly stated in the words of Judge Wallace in the case of Fabre *vs.* Steamship Co. (decided in the Circuit Court of Appeals for the Second Circuit), 3 C. C. A. 534, 53 Fed. 290. He says:

"Prudent seamanship requires a steam vessel navigat-"ing in a fog, hearing apparently forward of her beam "the fog signal of another vessel, the position of which is 'not ascertained, if the circumstances of the case admit, to

"stop her engines and then navigate with caution until "danger of collision is over."

This rule, as Judge Wallace states, had been incorporated into the "Regulations for Preventing Collisions at Sea," adopted by the International Marine Conference of 1889, where it appears as Article 16; but is found there because nautical experience had determined that it was necessary to observe such a rule, and the Courts have often declared it obligatory. In the case of the City of New York, 147 U. S. 84, 13 Sup. Ct. 211, the Supreme Court said:

"There is no such certainty of the exact position of a "horn blown in a fog as will justify a steamer in specu- "lating upon the probability of avoiding it by a change "of the helm, without taking the additional precaution of "stopping until its location is definitely ascertained."

Applying this rule to the present case, we find that the Oceanic, being warned by fog signals apparently forward of her beam that another vessel was approaching through the channel, instead of keeping on in the direction of danger, should have stopped her engines and then navigated with caution until the danger of collision was over. The claim that is made that she reduced her speed to dead slow off Point Bonita, when the fog signals were first heard, did not meet the requirement of the situation, even if her speed was only at the rate of 7 knots per hour; but if we conclude that she was steaming and drifting in the tide at the rate of 10 knots per hour, then, clearly, she was proceeding in gross violation of the rule, and must be held responible for the consequences.

The question now is, was the Oceanic, having an un-

known vessel on her starboard side, required to act on the fog signals of the latter and keep out of her way, as provided in Article 16 of the Rules and Regulations of 1885, or was the Oceanic at liberty to go on until the approaching vessel should come in view, and then regulate her conduct in accordance with the situation as it should then appear? Would the mere fact that the fog prevented the officers of the Oceanic from getting sight of the City of Chester sooner excuse or relieve them from acting upon the signal of danger which her fog blasts indicated? To admit that they were justified in pursuing such a course, would, in my judgment, avoid this important rule of navigation and remove one of the most effective safeguards against collision in foggy weather. This examination into the conduct of the Oceanic with respect to the fog signals of the City of Chester has not been made, however, for the purpose of determining whether she was at fault during this stage of her progress. It has been rather for the purpose of better undestanding her later movements, which are the subject of controversy.

We come now to consider the conduct of the Oceanic after the City of Chester came in view. The latter vessel was discovered looming up through the fog about a half a mile distant on the starboard bow of the Oceanic, precisely as the fog signals had previously indicated. It was certainly then the duty of the Oceanic to adopt prompt measures to keep out of the way of the City of Chester. The Aurania, 29 Fed. 124; the Ogemaw, 32 Fed. 922. What did she do? She signalled to the City of Chester, with two blasts of the whistle, that she would direct her course to port, and for the City of Chester to do the same,

and accordingly the helm of the Oceanic was put hard astarboard. The City of Chester responded to the signal of the Oceanic with two blasts of her whistle, indicating that she would direct her course to port—that is to say, she would pass on the starboard side of the Oceanic. It was, however, soon discovered that the City of Chester was not carrying out the agreement, but, on the contrary, was acting as though under the influence of a port helm and was directing her course to starboard. Two minutes after the first signal, the Oceanic gave the second signal of two blasts, adhering to her previous determination to direct her course to port, and indicating that the City of Chester should do the same. The City of Chester answered as before, but kept on the contrary course. Almost immediately after, the order was given on the Oceanic to go full speed astern; but this order came too late, for in two minutes the vessels were in collision.

Counsel for respondent claim that the rule which requires that a vessel which has another on her starboard side shall keep out of the way of the other does not apply in this case because the steamers, as it is claimed, were not on crossing courses. The contention is based upon the ground that if the line of the course of the Oceanic had been produced, when the vessel first caught sight of the City of Chester, it would never have touched the City of Chester; while, if the line of the course of the City of Chester had been produced, it would have crossed the Oceanic somewhere about the funnel or bridge. These, they claim, do not constitute crossing courses. It is admitted that the vessels were not end on to each other, and they were not on parallel courses, but they were approach-

ing each other from opposite directions, obliquely. The City of Chester was so headed, and both vessels were so advancing and approaching each other, that, unless they changed their courses radically, the bow of the City of Chester would eventually strike the Oceanic amidships. This is the very thing which the rule was designed to prevent. If this was not a crossing course by one vessel, involving a risk of collision, it is difficult to understand how the course could be designated, or what rule of navigation could apply. If their contention be true, then, as the vessels were confessedly not end on, nor on crossing courses, none of the rules would be applicable. But I think there can be no question that the vessels were on crossing courses within the meaning of Article 16. The language used is very broad, and apparently refers to any crossing of courses involving risk of collision. The very fact that it does not specify any particular course or courses indicates, to my mind, the general character of the rule. One vessel may be crossing the path of another, or both may be approaching on converging lines so as to meet at a given point, or, as in the case at bar, one may so bear upon another that, eventually, if no change is made in the course of one or both, a collision is rendered imminent. In any of the above instances the risk of collision, all things being equal, is as great in the one case as in the other. The vessels, in my opinion, were on crossing courses, within the meaning of the rule; and the Oceanic, having the City of Chester on her starboard bow, and being apprised of that fact, or chargeable with notice of that fact, from the direction of the repeated fog signals, for some 10 or 12 minutes before the collision, should have

kept out of the way, and should have taken steps to do so much sooner than she did. The Lepanto, 1 C. C. A. 503, 50 Fed. 234; the Georgia, 1 C. C. A., 489, 50 Fed. 129.

We have now reached the important question in the case: Was the Oceanic at fault in failing to reverse sooner than she did? The testimony indicates that when the first signal was given, and answered by the the City of Chester, the helm of the Oceanic was put hard a starboard. There is, however, a discrepancy in the testimony of Pilot Meyer on this point. He first says that the helm was put hard a starboard at this time, and again his statement would seem to indicate that the helm was not put hard a starboard until the second signal was given, but the captain and officers agree that the helm was placed hard a starboard immediately after the first signal. This order, it will be remembered, was given as soon as the City of Chester had been discovered through the fog. The distance at which the City of Chester was first seen was about half a mile. Although this vessel answered the two whistles of the Oceanic with two, thus agreeing to go to port, yet she did not, at any time before the collision, act in accordance with her signal. All the witnesses on the Oceanic agree that the City of Chester failed absolutely to comply with her promise. Upon answering the first signal, she seemed to respond to her starboard helm just a trifle; but this was only momentary, for she seemed to be under the influence of a port helm,—going to the right instead of to the left. Her course to the right was not a sudden or radical change from the left to right, but it was a steady and gradual change, becoming more apparent all the time, until, when under full speed astern, with her

helm hard a starboard, she went to starboard so rapidly that she got across the bows of the Oceanic, that vessel running into her on her port side some 20 feet abaft the bow. But at no time, the witnesses of the Oceanic all swear, did the City of Chester appreciable answer her starboard helm, by going to the left, as she had agreed to do. This fact was observed by the pilot, captain, and officers; and yet no steps were taken by either the pilot or the captain to ascertain whether the signal had been misunderstood, or incorrectly answered. Fully two minutes were allowed to pass by, the vessels meanwhile continuing to approach each other, when the pilot, becoming alarmed at the aspect affairs were assuming, ordered two whistles, —to go to port,—which the City of Chester answered also with two. About half a minute or thereabouts expired after this second signal had been given and answered, when, for the first time, the order to reverse was given by the captain of the Oceanic. It appears that it was about this time that the City of Chester first obtained a view of the Oceanic; and her captain, seeing that a collision was absolutely unavoidable, also gave the order of full speed astern. Both sides agree—that is, the witnesses on the Oceanic and the City of Chester concur—that, when the order to reverse was given by each, the collision was inevitable. It is plain that this order came too late to be of any utility, even to materially mitigate the disastrous effects of the collision, for the City of Chester was penetrated by the Oceanic fully 10 feet, or about half her beam, and could only be kept afloat by keeping the Oceanic impinged in the breach, and even then she was kept afloat for only five or six minutes. In this the

Oceanic was clearly at fault. She should have gone full speed astern much sooner, particularly in view of the warning conveyed to her in the fog-signals of the City of Chester. In my judgment the Oceanic should have been reversed the instant it was discovered that the City of Chester did not respond to her helm as she had agreed to. The situation was a critical one at that time, and called for immediate action, as further developments conclusively showed. It was absolutely necessary to reverse then to avoid, not a mere risk of collision, but a collision itself. The risk of collision, to my mind, existed for some time prior. It was certainly present when they first sighted the City of Chester. The very object of the maneuver which the pilot of the Oceanic elected to adopt, and acceded to by the City of Chester, was made with the view of avoiding a collision.

The pilot says: "I said: 'Now it is time to give him "two distinct whistles, to tell him we will starboard; he "is now on our starboard bow; he is going this way—so "that he may put his wheel starboard and clear us.'"

The testimony of this witness as to when the danger of collision arose is significant:

"Q. Do you mean to tell us that there was but one "thing that would have saved the ship from colliding with "you after you first saw her, and that was that she should "go to starboard—that she should obey her starboard "helm? A. Certainly. Q. That is the only thing that "would prevent a collision from the time you first saw "her? A. Yes, sir. Q. Then from the time you first "caught sight of the Chester you felt that there would be "a collision unless she went to port? A. Yes, sir. Q. Un-

" less she obeyed her starboard helm? A. Yes, sir. Q. Is
" that right? A. Yes, sir. Q. If that is the condition
" of affairs, why did you sound the second signal?
" A. Because she did not go that way. Q. You sounded
" the second signal to get her to go that way? A. Yes,
" sir."

Again:

" Q. As I understand, you say when you saw the City of
" Chester a half a mile away, and some three points on
" her starboard bow, that nothing could avert the collision
" or disaster except her turning to starboard? A. That
" is what it is."

This testimony is substantiated by that of Captain Metcalfe and the other officers of the Oceanic.

Now, if it was necessary when the City of Chester came into view for both vessels to act in order to clear each other, it is too plain to need comment that there was a serious risk of collision. That being true, the instant that the officers of the Oceanic saw that the City of Chester did not do as she ought to have done, with all the means at their command, their skill and experience, and in view of the significant symptoms of danger already adverted to, they should certainly have stopped and reversed. The language of Judge Simonton in delivering the opinion of the Circuit Court of Appeals for the Fourth Circuit, in the case of The Louise, 3 C. C. A., 330, 52 Fed. 885, is applicable to the case at bar. He says.

" These (the rules of navigation) leave but little room
" for mere conjecture in controlling the action of the master
" and pilot. Each of them has in his power the means of
" ascertaining with approximate certainty the intention

"and course of an approaching steamer. He must use "them. Notwithstanding this, errors committed by one "of two vessels approaching each other from opposite di-"rections do not excuse the other from adopting every "proper precaution required by the special circumstances "of the case to prevent a collision. Rule 24; The Maria "Martin, 12 Wall. 47; The Scotia, 14 Wall. 181. If "there be any uncertainty as to the intentions of the ap-"proaching vessel. This of itself calls for the closest "watch and the highest degree of diligence on "the part of the other vessel, with reference to her "movements, and it behooves those in charge to be prompt "in availing themselves of every resource to avoid not "only a collision, but the risk of such a catastrophe. The "Manitoba, 122 U. S. 108, 7 Sup. Ct. 1158."

In the America, 92 U. S., 432, Mr. Justice Clifford, speaking for the Supreme Court, said:

"Sailing rules were ordained to prevent collisions be-"tween ships employed in navigation, and to preserve life "and property embarked in that perilous pursuit, and not "to enable those whose duty it is to adopt, if possible, the "necessary precautions to avoid such a disaster, to deter-"mine how little they can do in that direction without be-"coming responsible for its consequences in case it occurs."

Again:

"Rules of navigation are ordained to preserve life and "property and not to promote or authorize collision. Even "flagrant fault committed by one of two vessels approach-"ing each other from opposite directions will not excuse "the other from adopting every precaution to prevent a "collision. The Maria Martin, 12 Wall. 47."

The case of the Khedive (decided by the House of Lords in 1880), 5 App. Cas. 876, is in point. The facts of that case were not as strong against the vessel failing to reverse in a seasonable time as in the case at Bar. There the collision had been precipitated by another vessel—the Voorwaarts—suddenly altering her course. The master of the Khedive, thus taken unawares, gave the order to place the helm hard a starboard and for the engineers to stand by the engines ready for any emergency. About a minute and a half later he gave the order, "Full speed astern." But after an elaborate consideration of the case the House of Lords held that he gave the order to reverse too late; that he should have done so when he directed the engineers to stand by their engines; that the rule of navigation, that "every steamship, when approaching an other ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse"—which is the same as our rule (Article 18 of the Act of March 3, 1885)—gave the master no discretion when risk of collision was present; that he was bound to stop and reverse at the first moment of danger; and that, as he had not done so, the Khedive was in part to blame. Lord Blackburn observes:

"We are advised, and of the opinion, that under the "circumstances and in the position of those two ships, it "was quite right that the helm of the Khedive should be "put hard a starboard. But then comes the question "whether the captain ought not, at the time he gave the "order to put the helm hard a starboard, to have ordered "the engines to be stopped and reversed. It was obvious "that at that moment there were two steamships approach-"ing each other in great danger of collision. It is obvi-

" ous, therefore, that the rule of navigation applied, unless
" there were something which made it necessary for the
" safety of the navigation that the rule as to stopping and
" reversing should not be acted upon."

Speaking of the conduct of the master of the Khedive, he says:

" He at once took in the situation and was aware that
" there was risk of collision and that it was imminent if
" not inevitable; and he acted with great promptitude and
" skill, so as greatly to alleviate the violence of the inevi-
" table condition. But he did not stop and reverse, nor
" even slacken his speed; and there he departed from the
" course prescribed by Regulation 16. Nor was there any-
" thing in the circumstances rendering a departure
" from this rule necessary in order to avoid immediate
" danger. Even if it would, in the absence of such a
" positive rule, be better seamanship to keep way on the
" ship in order to make her more manageable (which is
" not clear), the Legislature has thought it better to pre-
" scribe the course which must be followed."

In the case at bar fully two and a half minutes at least were allowed to pass by after the dangerous proximity of the City of Chester had been discovered before the order to reverse was given, and the risk of collision cannot be said to have been an imminent one. It was a foregone conclusion. The order to reverse was delayed in the face of the fact that during all this time it was seen that the City of Chester was not answering her helm and was not going to port; but, on the contrary, was going to starboard. The City of Chester was not, in fact, executing the maneuver relied on to avoid a collision. This was ob-

served from the first. The pilot and Captain of the Oceanic should therefore have appreciated the imminent risk of collision the instant they saw that the City of Chester did not respond to her helm, and should have acted promptly. They neither stopped nor did they reverse. They now seek to justify their tardy action upon the ground that as the master of the City of Chester signalled that he would go to port, they were justified in relying upon that signal, and this in the face of, and with positive and convincing evidence of, facts which showed that the City of Chester was not doing as she had agreed to do, but was doing just the opposite. If they did not observe these facts they should have done so, and their failure to do so cannot be excused.

In the case of the Peryl (decided by the Court of Appeals), 9 Prob. Div. 137 (1884), Breet, M. R., held that although the Beryl had the right of way, and had slackened her speed from a quarter to a half a mile distant from the Abeona, and had stopped and reversed some [illegible]00 yards distant, she was still in fault for failing to reverse soon enough, and she was held mutually liable with the Abeona. The learned Judge observed:

" I am sorry in this case to have come to the conclusion
" to which I feel bound to come. I take it that the basis
" of the regulations for preventing collisions at sea is that
" they are instructions to those in charge of ships as to
" their conduct, and the Legislature has not thought it
" enough to say, 'We will give you rules which shall pre-
" vent a collision.' They have gone further and said that,
" 'For the safety of navigation we will give you rules
" which shall prevent risk of collision. It is not enough

" if you do only that which will apparently prevent a col-
" lision. We will give you rules which shall regulate
" your conduct, not merely for the purpose of
" preventing even a risk of collision ' * * * *
" Another rule of interpretation of these regulations
" is (the object of them being to avoid risk of col-
" lision), that they are all applicable at a time when
" the risk of collision can be avoided—not that they
" are applicable when the risk of collision is already fixed
" and determined. We have always said that the right
" moment of time to be considered is that which exists at
" the moment before the risk of collision is constituted.
" The words are not, ' If two ships under steam are cross-
" ing with a risk of collision,' but ' are crossing so as to
" involve risk of collision ;' that is, the moment before
" there was a risk of collision."

And again he observes:

" That rule (to slacken speed, or to stop and reverse, in
" my opinion, like all others, applies particularly to the
" moment the risk of collision is constituted and exists.
" It is at a time when the action of both steamers is such
" as to involve risk of collision. At that moment of time,
" if what they are doing involves a risk of collision, they
" are both to slacken their speed. It applies to each of
" them. But it may be that the condition of things just
" before the moment when the risk of collision is to be
" constituted is such that slackening will not avoid that
" risk of collision, and that it requires another maneuver,
" namely, that of stoping and reversing, and then they
" must stop and reverse, either one or the other, or both.
" That again, is an instruction as to the conduct of men,

" and it cannot be that they are to do that thing merely
" because it is proved afterwards that there was a risk of
" collision, or if there was risk of collision about to be
" constituted. It must apply if the circumstances are such
" that an officer of ordinary skill and care would be
" bound to come to the conclusion that if the ships
" continue to approach each other there will be risk of
" collision."

The case of Fabre v. Steamship Co., Supra, involved the question of responsibility for a collision between the steamship Umbria and Iberia near the entrance to New York harbor. The District Court held that the Umbria alone was in fault. The Circuit Court of Appeals found that both vessels were to blame, and in commenting on the conduct of the Iberia, said:

" During the interval of probably eight minutes, the
" whistles of the Umbria apparently continued to bear
" steadily at about the same place, on the Iberia's port
" hand. This should have made it clear to the master of
" the Iberia that the vessels were approaching, so as to in-
" volve the risk of collision. Under such circumstances,
" it was his imperative duty to stop his vessel until he
" could come to a clear understanding of the course of
" the Umbria. The event proved that she would have
" escaped if her engines had not been put at full speed;
" but it could not be foretold that she could do so, and the
" only proper course was to observe the rule which
" requires steam vessels, when approaching one another,
" so as to involve risk of collision, to slacken speed, or if
" necessary, stop and reverse. It is the imperative rule,
" when two steamers are approaching each other in a fog,

" and the signals of each of them indicate that they are
" drawing together on opposite or crossing courses, for
" each to stop until a clear understanding is reached with
" regard to their respective positions and courses; and, if
" there be any confusion of signals, or any other apparent
" risk of collision, not only to stop, but to reverse their
" engines."

The Court cites a number of cases in support of the doctrine; among others, that of the Beryl, *supra.* There are also many other cases to the same effect; and, while it may appear that the situations in these several cases differ in some particulars from the one at bar, nevertheless the rule of safety, as declared by the Courts, is applicable here, and determines that the Oceanic, under the circumstances of her situation, was at fault in not stopping and reversing her engines to prevent the collision. In this connection, the conduct of the captain and pilot with respect to the probable effect of the tidal current upon the City of Chester should not be overlooked. They both admit that they did not take into consideration the probable effect which the tide rip or cross-current, which they knew the City of Chester had to cross, would have on her starboard helm. They claim that this was a matter solely for the captain of the City of Chester to have taken into consideration when he assented to their signal to go to port. They claim, further, that they did not know as a matter of fact the position of the City of Chester with respect to the tide rip; but they admit that they knew where the tide rip was, and they admit that they knew the position of the City of Chester, for they had sight of her when she was a half a mile off—so they claim—and kept

her in view continuously up to the collision. Putting all this information together, it would not have been such a difficult task to determine, approximately, of course, the fact whether or not the City of Chester had not crossed the tide rip. But they confess they did not give "the matter "of the Chester being caught in that tide any considera- "tion whatever." And yet the captain admits that a vessel going from slack water into a cross current would be carried off her course to some extent, and that such was the effect of this rip tide upon vessels crossing it going out of the harbor; and he also states it as his opinion that when he first caught sight of the City of Chester she had not yet crossed that rip. He says:

"Assuming the position of the City of Chester to be half "a mile from me on my starboard bow when the first sig- "nal was given, she was not within the influence of that "tide rip in the neighborhood of Fort Point."

He therefore knew or should have known that the City of Chester had to cross that current, and yet he confesses that he gave the matter no consideration whatever; in other words he ignored this factor completely, and the order to go to port was given by the pilot, and insisted on, regardless of the probable effect of the flood tide on the helm of the City of Chester.

In the case of The John H. May, 52 Fed. 882, Judge Butler said: "He (the captain) says that he was unaware "of the state of the tide, which tended to carry the barge "upward. This was inexcusable ignorance for which, "also, his vessel must answer." In the case of The Oge- maw, 32 Fed. 919, the same doctrine is affirmed: "A "steamer bound to keep out of the way must, at her own

"peril, shape her course for a safe margin against the "contingencies of navigation and the effect of tide currents."

In view of these established rules of navigation, the conclusion is reached that the Oceanic was at fault in her movements, and, failing to use ordinary care in attempting to pass the City of Chester, she is mutually responsible with the City of Chester for the damages resulting from the collision.

As to the amount of damages: The deceased, Henry Smith was thirty-two years of age and in first-class health. He had been married for some five years and a half, and was the father of three children, one of whom, Myrta Smith, also lost her life in the disaster. He had been engaged, just previous to his death, in the dairy business in Sacramento, Cal. His widow testifies that he owned some property in connection with the dairy business, 160 acres of land, about 45 cows, 10 or 15 head of horses and mules; that he supported himself and family, including his father and sister-in-law; that the family expenses were from $75 to $100 per month, and that he made from $50 to $75 over that sum a month. His yearly earnings would, therefore, at that rate amount to from $1,500 to $2,100. He had $500 on his person when drowned, which was missing when his body was found. Testimony was introduced to show, that to purchase an annuity of $1,500 on a male person thity-two years of age and in good health, would require $24,882 in cash. There are, however, considerations involved in determing the value of a life not embraced within the rules of the annuity tables. Morgan *vs.* Southern Pac. Co., 95 Cal. 521, 30 Pac. 601; Cheatam *vs.*

Red River Line, 56 Fed. 248; In re Humboldt Lumber Manufacturers' Ass'n, 60 Fed. 428. In fourteen States these considerations have found expression in statutes limiting the amount that may be recovered for the death of a person to $5,000, and in two States and one Territory the law limits the amount to $10,000. There is no limitation in this State. Section 377 of the Code of Civil Procedure provides that "such damages may be given as under all the circumstances of the case may be just." The statutes of those States which fix a limit have been noticed by the Courts in other States, and have have had weight in fixing the amount of damages. In view of all the circumstances of this case, I will assess the damages caused by the death of Henry Smith at $10,000.

Myrta Smith was over four and a half years of age and in good health. The Supreme Court of this State, in Morgan *vs.* Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, held that in an action by a parent to recover damages for the death of a minor child, caused by negligence, the main element of damage is the probable value of the services of the deceased during minority. Manifestly there is no rule that will enable the Court to estimate with any degree of accuracy, the probable value of the services of a child. But as the statute gives the right of action for the benefit of the parent without regard to circumstances, I must determine that there is some injury, which I fix in the sum of $1,000.

At a stated term of the District Court of the United States, for the Northern District of California, held at the Court room, in the City of San Francisco, on Monday, the 23rd day of April, in the year of our Lord, one thousand eight hundred and ninety-four.

Present:

The Honorable W. W. MORROW, Judge.

HENRY F. SMITH ET AL,
vs.
OCCIDENTAL & ORIENTAL S. S. CO. } No. 10,732.

On motion of W. H. Cobb, Esq., Proctor for the libelants, a decree in favor of libelants for ten thousand dollars ($10,000) and costs was this day signed and entered.

In the District Court of the United States in and for the Northern District of California.

In Admiralty.

Henry F. Smith and George C. Smith, Infants, by Eliza A. Smith, for herself and as Administratrix of the estate of Henry Smith, deceased. Libelants, vs. The Occidental and Oriental Steamship Company (a corporation) and The Pacific Coast Steamship Company (a corporation), Respondents.	

FINAL DECREE.

This cause heretofore came on regularly to be heard by the Court upon the libelants' libel and the answer thereto of the respondent, the Occidental and Oriental Steamship Company, a corporation (the respondent, the Pacific Coast Steamship Company, having by reason of proceedings taken by it pursuant to Sections 4,282 and 4,289 of the Revised Statutes of the United States been dismissed herein), and upon the proofs submitted by the respective parties, and proctors for both parties having been heard thereon, and the cause having been tried on its merits and submitted to the Court for its determination, and the

Court having delivered and filed its decision in writing in the case, wherein and whereby it finds the allegations of the libel herein to be true, except that the Court finds the libelants have been damaged by said respondent, the Occidental and Oriental Steamship Company, in the sum of ten thousand dollars ($10,000) only, instead of the sum stated in the libel, and the Court having ordered the final decree to be made and entered herein in favor of libelants and against the said respondent, the Occidental and Oriental Steamship Company, for the sum of ten thousand dollars ($10,000).

Therefore, by reason of the premises, it is ordered, adjudged and decreed that the said libelants, Henry F. Smith, George C. Smith and Eliza A. Smith, for herself, and also as administratix of the estate of Henry Smith, deceased, do have and recover of and from the respondent, the Occidental and Oriental Steamship Company (a corporation), the sum of ten thousand dollars ($10,000), with legal interest thereon from the date hereof, together with libelants' costs of suit herein taxed at

It is further ordered, adjudged and decreed herein that the said sums may be paid to the proctors of libelants, and that said proctors may enter complete satisfaction of this decree upon payment to them of the said sums hereinbefore specified.

It is further ordered, adjudged and decreed herein, that unless this decree be satisfied or proceedings thereon be stayed on appeal within the time limited and prescribed by the rules and practice of this Court, that the libelants have execution against respondent, the Occidental and Oriental Steamship Company (a corporation), to enforce

satisfaction of this decree, or so much thereof as shall remain unsettled.

Done in open Court at the stated term, etc., this 23d day of April, A. D. 1894.

WM. M. MORROW,
District Judge.

[Filed]: April 23d, 1894.

SOUTHARD HOFFMAN, Clerk.
By J. S. Manley, Deputy Clerk.

In the District Court of the United States, Northern District of California.

In Admiralty.

HENRY F. SMITH, ET AL.,
Libelants.
vs.
THE OCCIDENTAL AND ORIENTAL STEAMSHIP CO., ET. AL.,
Respondents.

BILL OF COSTS OF LIBELANTS.

Item	Amount
Proctor docker fee	$ 20.00
Deposition of Sarah Nye	7.80
Affidavit of taking deposition	.50
Certified copy of Letters of Administration	1.50
Clement Bennett, Court room reporter	117.00
Cash paid U. S. Marshal	25.00
Cash paid witnesses	70.60
	$242.40

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

W. H. Cobb being duly sworn deposes and says, that he is one of the Proctors for libelants in the above action, and was as such is better informed as to the items charged in the foregoing memorandum than said libelants; that to the best of his knowledge and belief the foregoing items of costs and disbursements in this action are correct, and that the said disbursements have been necessarily incurred in said action.

Subscribed and sworn to before me this 24th day of April, 1894.

W. H. COBB.

[SEAL.] L. M. HOEFLER,
Court Commissioner of the City and
County of San Francisco.

Libelants Proctor's costs taxed at $242.40, the payment of $20 to Clerk being stricken out.

SOUTHARD HOFFMAN, Clerk.

May 1st., 1894.

In the District Court of the United States Northern District of California.

HENRY F. SMITH, ET. AL., Libelants, vs. OCCIDENTAL & ORIENTAL STEAMSHIP CO., ET. AL., Respondents.	

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

W. H. Cobb being duly sworn deposes and says: that he is one of the Proctors for libelant in the above entitled action, and paid out the money for witness fees on the trial of said cause. That there was actually paid to the following named witnesses the several amounts of money set opposite their respective names, but such receipts as were taken therefore are mislaid and lost.

J. J. Loggie,	1	days	attendance	$1.50
Frank Cookson,	3	"	"	4.50
John Lundum,	5	"	"	7.50
Jos. Rankin,	5	"	" and 20 mi. travel..	8.50
F. Westdahl,	1	"	"	1.50
Louis Meyer,	1	"	"	1.50
John Metcalfe,	1	"	"	1.50
Rufus Comstock,	4	"	"	6.00
Clitus Barbour,	1	"	"	1.50
Chas. McCullom,	1	"	"	1.50

W. H. COBB.

Subscribed and sworn to before me this 24th day of April, 1894.

[SEAL.] L. M. HOEFLER,
Court Commissioner of the City and County of San Francisco, State of California.

In the District Court of the United States, Northern District of California.

HENRY F. SMITH, ET AL., vs. THE OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY, a corporation.	}

STATE OF CALIFORNIA, County of Sacramento. }

Clinton L. White, being duly sworn, says that he is one of the Proctors of libelants in the above-entitled cause; that, in addition to the items of costs in said cause necessarily paid out by libelant for which receipts are furnished, he, on behalf of libelants, also paid out the following items, all which were necessarily incurred in said cause:

Oct. 17th, 1892...	To Lincoln White, notary public, for affidavit for taking deposition	$0.50
Oct. 29th, 1892...	To Wm J. Davis, notary public, for taking deposition of Witness Sarah Nye	7.80
Aug. 26th, 1893...	To Clerk of Yolo County, for certified copy of letters of administration, required as evidence............................	1.50
Sept. 15th, 1893...	To Bennett, Court reporter ...	117.00
		$126.80

That other items of costs were paid by W. H. Cobb, on behalf of libelants, which affiant does not attempt to state in the above list.

CLINTON L. WHITE,

Subscribed and sworn to before me this 23rd day of April, 1894.

[SEAL.] CHAS. T. HUGHES,
Notary Public, in and for the County of Sacramento, State of California.

In the United States District Court, Northern District of California.

HENRY F. SMITH, ET AL.,
v.
THE OCCIDENTAL & ORIENTAL STEAMSHIP CO.

Received of libelants in the above entitled cause the sum of $10.20, being for one day's attendance as a witness, and mileage from Sacramento to San Francisco and return, 87 miles each way, on the trial of said action.

JACOB NOE.

United States Marshal's Office, Northern District of California. In the United States District Court.

SMITH, ET AL.,
vs.
O & O. S. S. Co.

SAN FRANCISCO, Aug. 21, 1893.

Received of M. G. Cobb, Plff's Counsel, twenty-five dollars, on account of costs and disbursements in the above-entitled suit.

W. G. LONG, Marshal.
By A. I. FARISH, Deputy Marshal.

In United States District Court, Northern District of California.

HENRY F. SMITH, ET AL., v. THE OCCIDENTAL AND ORIENTAL STEAMSHIP CO.	}

Received of libelants in the above entitled cause the sum of $13.20, being three days' attendance as witness, and mileage from Sacramento to San Francisco and return, 87 miles each way, on the trial of said cause.

MRS. SARAH J. NYE.

In the District Court of the United States, Northern District of California.

HENRY F. SMITH, ET AL., v. THE OCCIDENTAL & ORIENTAL STEAMSHIP CO.	}

Received of libelants in the above entitled cause the sum of $10.20, being for one day's attendance as a witness, and mileage from Sacramento to San Francisco and return, 87 miles each way, on the trial of said cause.

GEORGE B. BLUE.

Service of a copy of within admitted this 25th day of April, 1894, at San Francisco.

W. H. L. BARNES,
Proctor for Respondents.

[Endorsed:] Filed April 24th, 1894.

SOUTHARD HOFFMAN, Clerk.

Northern District of California. United States District Court.

HENRY F. SMITH, ET AL., vs. OCCIDENTAL & ORIENTAL S. S. CO ET AL.	No. 10,732.

1892—		
Oct. 29th	...Serving Subp. on Thomas Wallace and Jno. Lundey	$1.00
	Paid witness fees	3.00
31st	...Serving Subp. on Rufus Comstock	.50
Sept. 4th	...Serving Subp. on 12 witnesses for Plff.,	6.00
	Paid witness fees, $16.00; expenses, $2.50	18.50
13th	...Serving Subp. on W. A. Phillips for Plff.	.50
1894—		
Apr. 26th	...Poundage on $10,000	52.50
		$82.00
Sept. 14th	...By Cash from Plffs	29.50
		$52.50

[Endorsed:] Filed April 24th, 1894.

SOUTHARD HOFFMAN, Clerk.

District Court of the United States, Northern District of California.

HENRY F. SMITH, *et al.*, by A. SMITH, &c. vs. OCCIDENTAL AND ORIENTAL S. S. CO.	Nos. 257-10,732 in Admiralty.

CLERK'S COSTS.

Date	Item	Amount
1890—		
Aug. 19	...Filed complaint .20 iss'd summons $2.40	$2 60
	...Iss'd two copies summons..................	4 00
	...Iss'd two certified copies complaint, 18 folios	3 60
	...Seal and certificate to copies...............	1 40
21	...Filed summons .20, filed return .20, ent. return 30	70
27	...Filed demurrer of O. & O. S. S. Co...	20
Sept. 1	...Filed order extending time to Pacific S. S. Co. to plead.......................	20
Nov. 1	...Filed Ans. of Pacific S. S. Co...	20
1891—		
Jan. 2	...Filed notice to set demurrer for hearing..	20
	...Filed plffs' brief .20, Jan. 12th hearing on dem..................................	50
29	...Order demurrer overruled.................	30
Feb. 18	...Filed ans. .20, filed affd't of service of ans	40
1892—		
Feb. 1	...Order trial set for Mch. 15, '92.........	30
Mch. 15	...Order trial cont. for the term............	30
July 11	...Ent'g case on calender......	50
	...Order trial set for Oct. 10...............	30
Oct. 10	...Order trial cont. to Nov. 9th..............	30

Oct.	29	...Iss'd supb. .50, and two copies .80, plff..	1 30
	31	...Iss'd supb. 50, and 1 copy 40	90
		...Filed two supbs. on ret. .40, filed rets. 40, ent. returns .60......................	1 40
Nov.	1	...Iss'd supb. .50, and copy .40, for plff...	90
	9	...Order cause dismissed as to Pacific Coast S. S. Co	30
		...Order trial continued for term...........	30
	28	...Order trial set for Jan. 16................	30
1893—			
Jan.	16	...Order trial cont. for the term...........	30
Feb.	3	...Iss'd supb. .50, and 14 copies $5.60, plff	6 10
July	10	...Entering case on calender....	30
Aug.	14	...Order trial set for Sept. 4th..............	30
	19	...Iss'd supb. .50, and 15 copies plff. $6.00	6 50
	28	...Iss'd supb. .50, and 18 copies for deft. $7.20	7 70
	30	...Iss'd supb. .50, and 6 copies for deft. $2.40	2 90
Sept.	4	...Filed supb. on ret. .20, filed ret. .20, ent. ret. .30..................	70
		...Order trial cont. Sept. 7.................	30
		...Filed supbs. 2 on ret. .40, filed rets. .40, ent. rets. .60...	1 40
		...Filed stip. that this action is one in admiralty......................................	20
		...Hearing .30, order libs, allowed to amend etc., swearing witnesses libs. .40......	70
Sept.	8	...Order further hearing cont., etc.........	30
	12	...Further hearing .30, swearing 8 witnesses for libs, etc.......................	1 90

Sept. 13	...Iss'd supb. .50, and copy for lib. .40...	90
	...Hearing resumed .30, swearing 5 witnesses for lib. $1.00, and 9 for respondents $1.80..........................	3 10
Sept. 14	...Further hearing .30, argued and sub. filed testy .20..............................	50
27	...Order proctors for libs. submit brief, etc.	30
1894—		
Jan. 3	...Filed order allowing Barnes withdraw Ex. 1......................................	30
Apr. 10	...Order libelants' recover $10,000 and cost, etc., filed opinion .20...........	50
18	...Made two copies of opinion for respondents 300 folios..........................	60 00
23	...Order decree signed and entered.........	30
	...Filed decree .20, entered same $1.80...	2 00
24	...Filed proctor for libelants' bill of costs..	20
	...Filed marshal's bill of costs...............	20
	...Filed clerk's bill of costs..................	20
	...Made and filed judgment record.........	2 50
	...Docket indices..............................	6 00
		$127 80

Taxed at $127.80.

SOUTHARD HOFFMAN, Clerk.

April 24th, 1894.

[Endorsed:] Filed April 24th, 1894.

SOUTHARD HOFFMAN, Clerk.

In the District Court of the United States in and for the Northern District of California.

In Admiralty.

Henry F. Smith and George C. Smith Infants, by Eliza A. Smith their Guardian, and Eliza A. Smith for herself and as Administratrix of the Estate of Henry Smith, deceased, Libelants. vs. Occidental & Oriental Steamship Company (a corporation) and Pacific Coast Steamship Company, (a corporation), Respondents.	No. 10,732.

And now, by its Proctors, W. H. L. Barnes and Frank Shay, comes the Occidental and Oriental Steamship Company, a corporation, respondent in the above entitled action, and prays this Honorable Court to allow an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of the said District Court in said action, made and entered on the 23rd. day of April, 1894; and also that an order be made fixing the amount of security which respondent shall give and furnish upon taking said appeal; and that upon giving said security all further proceedings in this Court be stayed and suspended until the determination of said appeal by

the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray etc.

Dated May 1st., 1894.

W. H. L. BARNES AND
FRANK SHAY,
Proctors for Respondents, the Occidental & Oriental Steamship Co., a Corporation.

[Endorsed:] Filed May 1st., 1894.
SOUTHARD HOFFMAN, Clerk.

In the District Court of the United States in and for the Northern District of California.

In Admiralty.

HENRY F. SMITH and GEORGE C. SMITH, Infants, by ELIZA A. SMITH their Guardian, and ELIZA A. SMITH for herself, and as Administratrix of the Estate of HENRY SMITH, deceased, Libelants. vs. OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY (a corporation) AND PACIFIC COAST STEAMSHIP COMPANY (a corporation), Respondents.	No. 10,732.

Upon petition, and motion of W. H. L. Barnes and

Frank Shay, Proctors for the Occidental and Oriental Steamship Company, a Corporation, respondent in the above entitled action, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree heretofore and on the 23rd. day of April, 1894, made and entered in said United States District Court be, and the same is hereby allowed; and the bond to be given on said appeal is hereby fixed at the sum of $20,000, and it is further ordered that upon the giving of said bond all further proceedings in said District Court be stayed until the determination, by the United States Circuit Court of Appeals for the Ninth Circuit, of said appeal.

Dated May, 1st., 1894.

WM. W. MORROW,

Judge of said United States District Court.

[Endorsed:] Filed May 1st., 1894.

Southard Hoffman, Clerk.

In the District Court of the United States, in and for the Northern District of California.
In Admiralty.

HENRY F. SMITH and GEORGE C. SMITH, Infants, by ELIZA A. SMITH, their Guardian, and ELIZA A. SMITH, for herself, and as Administratrix of the Estate of Henry Smith, Deceased, Libelants,

vs.

THE OCCIDNTAL AND ORIENTAL STEAMSHIP COMPANY, a Corporation, and the PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Respondents.

No. 10,732.

The Occidental and Oriental Steamship Company, respondent in the above entitled action, having petitioned said Court for an order permitting it to appeal to the Honorable the United States Circuit Court of Appeals for the Ninth District, from the judgment made and entered in said cause, now makes and files with its said petition the following, and specifies the same as its assignment of errors herein, and upon which it will rely for a reversal of said judgment:

1. That the said District Court of the United States erred in overruling respondent's demurrer to the complaint filed in said action, to which ruling of said District Court of the United States it duly excepted;

2. There was no evidence which proved or which tended to prove any negligence upon the part of defendant, or upon the part of its agents or servants, in the management of the steamship Oceanic, before or at the time of the collision with the steamship City of Chester;

3. There was no evidence which proved, or which tended to prove that the respondent, through its agents or servants in charge of the Oceanic failed to exercise proper care under all of the circumstances to avoid the collision, or that it did anything that it ought not to have done, or neglected to do anything that it should have done;

4. There was no evidence which proved, or which tended to prove that respondent, through its agents on the Oceanic, or otherwise, had or ought to have had any knowledge as to the inability of those in charge of the City of Chester, to safely navigate her, with due regard to tides and currents, and the ability to handle her in pursuance of the signals interchanged by the Oceanic and the Chester, which signals required each vessel to starboard her helm and go to port;

5. The evidence proved that the respôndent, through its agents, handled the Oceanic properly, prudently and carefully in every respect, and observed and exercised all the care which the law imposed upon it under all the circumstances of the case, and that the collision between the Oceanic and the Chester occurred without any fault on the part of respondent or its agents;

6. The evidence proved that the collision occurred solely by reason of the inability of the persons in charge of the Chester to control and manage that vessel, and that when the respondent, through its agents in charge of the

Oceanic, observed that fact and saw that the Chester was not being managed pursuant to the signals interchanged by the two vessels, it promptly, carefully and prudently used all means in its power to avoid a collision;

7. The evidence proved that the respondent, through its agents, navigated the Oceanic in strict accordance with the rules and laws of navigation, before and at the time of the collision, and that it exercised due and proper care to avoid collision;

8. The evidence proved that the Oceanic arrived off the port of San Francisco, on the morning of August 22d, 1888; that the weather was foggy; that as the steamship entered the harbor its officers and crew were at their proper stations; that an efficient lookout was kept and proper dicipline maintained; that the proper fog signal was given and had been given by blasts of the steam whistle sounded at intervals of less than a minute for several hours preceding the collision with the Chester; that for several hours preceding said collision, the speed of the Oceanic had been moderate, ranging from half speed to slow, dead slow and with occasional stops; that for eleven minutes before the collision, the Oceanic was proceeding "dead slow," with just sufficient movement of her engines to maintain steerage way; that when near Point Diablo, in the bay of San Francisco, the master and pilot of the Oceanic saw the Chester looming up through the fog and at a distance of half a mile; that the Chester was moving at full speed; that she was two and a half points off the starboard bow or right hand side of the Oceanic; that immediately thereupon, pursuant to the rules of navigation, the master of the Oceanic sounded

two blasts of the steam whistle which meant "I am going to starboard my helm and pass to the left, you do the same"; that at the same time the helm of the Oceanic was put hard starboard; that the master of the Chester answered said signal with two blasts of his steam whistle, which meant that the Oceanic's signal was understood: that the helm of the Chester would be put starboard and that the vessel would also go to the left; that had the Chester acted on her starboard helm, as she had signaled she would do, the two vessels would have safely passed each other; that shortly after the first interchange of signals the Oceanic again sounded two blasts of her steam whistle, indicating that she was still starboarding her helm and going to the left, and that the Chester again answered with two similar blasts, indicating that she understood the Oceanic's signal, would starboard her helm and go to the left; that if, after such second interchange of signals, the Chester had starboarded her helm and gone to the left, as agreed, the vessels would have passed each other safely and there would have been no collision; that immediately after such second interchange of signals the master of the Oceanic observed that the Chester was not passing to the left pursuant to signal, but bore down upon the Oceanic as if under the influence of a port helm: that at the time such fact was observed, immediately after said second interchange of signals, the master of the Oceanic ordered the engines of the vessel to be put to "full speed astern," and that this order was immediately obeyed; that said order was given and obeyed about two minutes before said collision; that at the time of the giving and obeying of said order the Oceanic was going "dead slow"; that at

the time of the collision the Oceanic's headway had been stopped, and that she was beginning to move backward; that at the time the backwash from the propeller was coming forward and reached a point between the funnel and the bridge of the Oceanic; that the Chester slewed or swung around and struck the prow of the Oceanic and was so injured that she sank; that there was nothing left undone by the master of the Oceanic to avert the collision, and that the same occurred without any fault whatever on his part, or on the part of any one on board of the Oceanic.

9. The evidence proved that the Oceanic passed the tug Relief and the British ship Lord Wolsely about two miles outside of Point Bonita, an hour or more before the collision; that her course was then a northeasterly one; that she maintained that course, pointing for the northerly shore of the Golden Gate; that she passed into the Golden Gate from a quarter to a half mile from Point Bonita; that the officers of the Oceanic could see the loom of the land at Point Bonita through the fog; that she passed within a quarter of a mile from Point Diablo, and that the officers of the Oceanic could see the land at that point down the water's edge and for 20 feet above it; that they could see Lime Point; that they could not see any object on the southerly shore of the Golden Gate or the Bay of San Francisco; that it was usual and proper for vessels entering the harbor of San Francisco, on a flood tide, to come in on the northerly side of the channel; that the Oceanic came into port at a moderate speed; that she was carefully, prudently and ably handled and navigated; that her machinery, appliances, steering gear and equipments were in first-class order and condition;

10. The evidence proved that the Chester left her dock at about 9:15 a. m.; that after getting straightened out and headed down the bay her engines were going "full speed ahead;" that she encountered fog when opposite Black Point and began sounding her fog signal; that she heard and responded to the two-blast signal sounded by the Oceanic, indicating that she would starboard her helm and go to the left; that she responded to the second two-blast signal from the Oceanic, indicating that she understood the signal, could and would obey it and would go to the left; that she was a vessel of 1,100 tons register; that she had on board only 120 tons of freight and 115 passengers and a crew of 32 men; that a strong flood tide was running into the harbor of San Francisco through the Golden Gate, that the flood from the ocean struck the ocean shore below Fort Point and caused a tide rip or eddy which caused a powerful current to set across the channel in the direction of Lime Point; that said current had a velocity of five or six miles an hour; that when the Chester was opposite Fort Point and immediately before the second interchange of the two-blast signal the bow of the Chester was struck by said tide rip or eddy setting across said channel; that said tide rip or eddy caused the Chester to swing around and against the influence of her starboard helm and to take a northerly direction across said channel; that said tide rip or eddy so carried said Chester that she was thrown up and against the prow of the Oceanic, and was so injured that she sank; that after the Chester struck said tide rip or eddy, there was nothing that could have been done by those in charge of the Oceanic that was not done to avert a collision;

11. The evidence proved that the collision occurred at a point about a quarter of a mile from the north shore of the channel, and that the wreck of the Chester then sunk and now lies at a point near Lime Point, two-fifths of the width of channel from the northerly shore thereof and three-fifths of the distance from the San Francisco shore;

12. The evidence proved that there was no confusion or misunderstanding on the part of the master of the Chester or of the master of the Oceanic with respect to the signals interchanged; that the master of the Oceanic believed that the master of the Chester could and would do as he had agreed to do, viz: starboard his helm and go to the left; that there was nothing in the situation or in the conduct of the Chester to lead or cause the master of the Oceanic to think that the Chester would not or could not mind her helm and go to the left; that there was nothing in the situation or in the conduct of the Chester until she struck said tide rip or eddy and was deflected or turned from her agreed course, to cause the master of the Oceanic to believe that she would become unmanageable in said current or tide rip and would be carried across the bow of the Oceanic; that the master and pilot of the Oceanic were carefully and closely watching the Chester from the time she appeared in sight until she sank after the collision; that the moment it became evident that she was unmanageable or was not complying with her agreement to go to the left, they promptly adopted all possible means to avert a collision; that as soon as a risk of collision could possibly or reasonably be apprehended or known, the master of the Oceanic stopped and re-

versed his engines and caused them to go "full speed astern," and endeavored by every means in his power to avert a catastrophe;

13. The evidence proved that the officers of the Chester knew where she was; that they knew that the flood tide was coming in; that they knew of the tendency of the tide or current to set across the channel; that they knew whether or not they were able to navigate their vessel under all of the conditions then present; that they interchanged signals with the Oceanic, believing that they could manage their vessel pursuant to such signals; that the master of the Oceanic could not or did know anything about the Chester or the ability or inability of her officers to navigate her; that the master of the Oceanic had a right to assume that the officers of the Chester could and would navigate their vessel as agreed by the signals; that he had a right to assume that the officers of the Chester interchanged signals with the Oceanic in view of all of the circumstances and conditions then present, and to assume that such signals would be observed by the Chester; that as soon as he saw there was any doubt or difficulty respecting the course of the Chester, the master of the Oceanic promptly used all the means at his command and did all that was possible to avoid collision;

14. The evidence proved that the master of the Oceanic fully complied with the rules and laws of navigation in the conduct and navigation and management of his vessel; that he did nothing that he ought not to have done; that he failed to do nothing that he should have

done; that, so far as the Oceanic was concerned, the accident was unavoidable.

W. H. L. BARNES AND
FRANK SHAY,
Proctors for respondent, the Occidental and Oriental Steamship Company.

(Endorsed:) Filed May 1st, 1894.

SOUTHARD HOFFMAN, Clerk.
By J. S. MANLEY, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

In Admiralty.

HENRY F. SMITH and GEO. C. SMITH, Infants, by ELIZA A. SMITH, their Guardian, and ELIZA A. SMITH for herself, and as Administratrix of the estate of HENRY SMITH, deceased. Libelants, vs. OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY (a corporation) and PACIFIC COAST STEAMSHIP COMPANY (a corporation), Respondents and Appellants.	No. 10,732.

To the Honorable United States Circuit Court of Appeals for the Ninth Circuit:

The appeal of the Occidental & Oriental Steamship Company (a corporation), respondent above named, respectfully shows:

That upon the 19th day of August, 1890, libelants filed their verified libel in which they prayed judgment against respondents for the sum of seventy-five thousand two hundred and seventy-five ($75,275) dollars damages alleged to have been sustained by reason of the death of Henry Smith, the husband of libelant. Eliza A. Smith, and father of the other libelants, while a passenger on the steamship City of Chester, controlled and operated by the Pacific Coast Steamship Company (a corporation), one of the respondents above named, by reason of a collision occurring on the 28th day of August, 1888, at or near the entrance to the harbor of San Francisco, between said steamship and the steamship Oceanic, controlled and operated by the respondent, the Occidental & Oriental Steamship Company (a corporation), appellant herein, whereby said steamship, City of Chester, was sunk, and said Henry Smith drowned, and for costs of suit.

That thereupon the summons in said action was issued, and a copy thereof, together with a copy of said libel, served on respondent, the Occidental & Oriental Steamship Company (a corporation); whereupon the said respondent served on said libelants and filed with the clerk of said Court a demurrer to said libel, which said demurrer was thereafter and on the 29th day of January, 1891, by order of said Court overruled and said respondent allowed twenty (20) days thereafter in which to answer; that thereupon, in parsuance of said order, said respondent made and served upon said libelants, and on the 18th day of February, 1891, filed in said Court its said answer.

That on or about the first day of September, 1890, the Pacific Coast Steamship Company (a corporation), one of

the respondents above named, as charterer and lessee of the said steamship "City of Chester," filed a petition in this Court for a limitation of its liability under Section 4282–4289, Revised Statutes of the United States. Thereafter such proceedings were had that a decree was entered limiting the liability of said Pacific Coast Steamship Company (a corporation) to seventy-five ($75.00) dollars, the appraised value of a small boat saved from the wreck of the "City of Chester"; whereupon said action was dismissed as to the Pacific Coast Steamship Company (a corporation), leaving said Occidental & Oriental Steamship Company (a corporation), this appellant, the only remaining respondent.

That said action was brought originally with a view to the libelants availing themselves of such common law remedy as this Court could afford by virtue of the Judiciary Act, but, by a stipulation entered into between the parties and filed September 7, 1893, it was agreed that said cause was an Admiralty cause *in personam,* and should be treated as such.

That thereafter the trial of said cause was had before said Court and the Hon. W. W. Morrow, Judge thereof, upon the pleadings and stipulation so as aforesaid made and proofs taken, and said cause was thereupon and on the 14th day of September, 1893, submitted to the said Court for its decision.

That thereafter and upon the 10th day of April, 1894, the said Court rendered and delivered in writing its decision, wherein it found the allegations of the libelant's libel to be true, except that it found the libelants had been damaged by said respondent, the Occidental & Oriental Steamship Company (a corporation), in the sum of ten

thousand ($10,000) dollars, instead of the sum stated in said libel; and thereafter and on the 23d day of April, 1894, made and entered its decree in favor of said libelants and against said respondent, the Occidental & Oriental Steamship Company (a corporation), for the sum of ten thousand ($10,000) dollars, with the legal interest thereon from the date thereof, together with libelant's costs of suit, taxed at $

That thereafter the said respondent, this appellant, served upon Proctors for libelants, and on the 1st day of May, 1894, filed with the Clerk of said District Court, its assignment of errors and petition for, and thereupon obtained, an order from said United States District Court and the Honorable W. W. Morrow, Judge thereof, who tried said action, permitting appellant to make this appeal; whereupon this appellant served and filed with the Clerk of said Court its notice of appeal to said United States Circuit Court of Appeals for the Ninth Circuit.

That appellant is advised and insists that said decree is erroneous as said libelants were not and are not entitled to a decree in the sum named or in any sum whatsoever, or to any decree in its favor and against said respondent, this appellant, but on the contrary said respondent, this appellant, is entitled to a decree in its favor and and against said libelants for its costs and for said and other reasons set forth in its assignment of errors, appeals from the whole of said final decree, and prays that this Court proceed and hear and examine said cause on the pleadings and proofs in said United States District Court made and taken, and such other proofs to be introduced, and that the said

final decree of said United States District Court be reversed.

W. H. L. BARNES AND
FRANK SHAY,
Attorneys for Respondent and Appellant, the Occidental and Oriental Steamship Company (a Corporation).

[Endorsed:] Filed 1st day of May, A. D. 1894.
SOUTHARD HOFFMAN, Clerk.

United States District Court, Northern District of California.

HENRY F. SMITH and GEO. C. SMITH, Infants, by ELIZA A. SMITH, for herself and as Administratrix of Estate of HENRY SMITH, deceased, vs. OCCIDENTAL AND ORIENTAL STEAMSHIP CO., etc.	No. 10,732.

The Clerk of the above Court will proceed to make up and complete the transcript on appeal in the above entitled and numbered cause.

May 1, 1894.

W. H. L. BARNES AND
FRANK SHAY,
Proctors for Respondent and Appellant.

[Endorsed:] Filed May 1st, 1894.
SOUTHARD HOFFMAN, Clerk.

In the District Court of the United States, in and for the Northern District of California.—In Admiralty.

HENRY F. SMITH and GEO C. SMITH, Infants, by ELIZA A. SMITH, their Guardian, and ELIZA A. SMITH, for herself and as Administratrix of Estate of HENRY SMITH, deceased, Libelants, vs. OCCIDENTAL AND ORIENTAL STEAMSHIP COMPANY, a Corporation, and PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Respondents.	No. 10,732.

To the Clerk of said Court, Libelants herein and Clinton L. White Esq., and Wm. H. Cobb, Esq., their proctors.

You, and each of you take notice that the Occidental & Oriental Steamship Company, a corporation, respondent herein intends to and does hereby appeal from the final decree in said cause made and entered on the 23rd. day of April, 1894, to the United States Circuit Court of Appeals for the Ninth Circuit.

W. H. L. BARNES AND
FRANK SHAY,
Proctors for Respondents, the Occidental & Oriental Steamship Company, a Corporation.

Service of a copy of the within Notice of Appeal hereby admitted, this 2nd. day of May, A. D. 1894.

CLINTON L. WHITE AND
WILLIAM H. COBB,
Proctors for Libelants.

[Endorsed:] Filed May 2nd, 1894.

SOUTHARD HOFFMAN, Clerk.

In the District Court of the United States, in and for the Northern District of California.—In Admiralty.

HENRY F. SMITH and GEO. C. SMITH, Infants, by ELIZA A. SMITH their Guardian, and ELIZA A. SMITH, for herself and as Administratrix of the Estate of Henry Smith, deceased, Libelants, vs. OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY (a Corporation), and PACIFIC COAST STEAMSHIP COMPANY (a Corporation), Respondents.	No. 10,732.

KNOW ALL MEN BY THESE PRESENTS, that we, the Occidental & Oriental Steamship Company (a corporation), as principal, and Charles F. Crocker and A. N. Towne, as sureties, are held and firmly bound unto the above-named libelants in the full and just sum of two thousand dollars, to be paid to the said libelants, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of May in the year of our Lord one thousand eight hundred and ninety-four.

Whereas, lately, at a session of said District Court in a suit pending in said Court between Henry F. Smith and Geo. C. Smith, infants, by Eliza A. Smith, their Guardian, and Eliza A. Smith for herself and as administratrix of the estate of Henry Smith, deceased, libelants, and said Occidental & Oriental Steamship Company (a corporation), respondent, a final decree was rendered, made and entered against the said respondent, the Occidental & Oriental Steamship Company (a corporation), and the said respondent having obtained an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and filed the same in the Clerk's office of said District Court, to reverse the decree in the aforesaid suit, and a citation being about to issue, directed to said libelants, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, State of California, on a day to be therein specified.

Now, therefore, the condition of said obligation is such that if the said Occidental & Oriental Steamship Company (a corporation), shall prosecute said appeal to effect, and answer all costs and damages if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Occidental & Oriental Steamship
[seal.] Company (a Corporation).

By D. D. Stubbs, its Secretary. [seal.]
Chas. F. Crocker. [seal.]
A. N. Towne. [seal.]

NORTHERN DISTRICT OF CALIFORNIA,
City and County of San Francisco. } ss.

Charles F. Crocker and A. N. Towne, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself, says: That he is worth the amount specified in said undertaking, over and above his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and a freeholder within the said District.

CHAS. F. CROCKER [SEAL.]
A. N. TOWNE [SEAL.]

Subscribed and sworn to before me, this 2nd day of May, 1894.

[SEAL.] E. B. RYAN, Notary Public.

Form of bond and sufficiency of sureties approved this 2nd. day of May, 1894.

WM. W. MORROW,
Judge of said District Court

[Endorsed:] Filed May 2nd., 1894.

SOUTHARD HOFFMAN, Clerk.

In the United States District Court, Northern District of California.

Henry F. Smith, et al.,
Appellees.
vs.
Occidental and Oriental Steamship Company,
Appellant.

It is hereby stipulated by and between the Proctors for the respective parties that the original exhibits, maps, photographs and drawings, and models used upon the trial of the above entitled action in the United States District Court, Northern District of California, may be transmitted to the Circuit Court of Appeals for the Ninth Circuit, with the Apostles in the said action, without being attached thereto, and that said exhibits, maps, photographs, drawings and models need not be printed in the printed record in said cause.

Dated July 31st., 1894.

CLINTON L. WHITE, and
WM. H. COBB,
Proctors for Appellees.

W. H. L. BARNES and
FRANK SHAY,
Proctors for Appellant.

[Endorsed :] Filed July 31st., 1894.

Southard Hoffman, Clerk.

District Court of the United States, Northern District of California.

HENRY F. SMITH, ET AL., vs. OCCIDENTAL AND ORIENTAL STEAMSHIP COMPANY.	No. 10,732.

ACCRUING CLERK'S COSTS.

1894—		
May 1st	Filed Petition for Allowance of Appeal	$ .20
	Filed Order Allowing Appeal, &c	.20
	Filed Assignment of Errors	.20
	Filed Formal Appeal	.20
2nd	Filed Notice of Appeal	.20
	Filed Supersedeas Bond	.20
	Filed Approval of Bond	.20
July 31st	Filed Stipulation as to Exhibits, &c	.20
	Filed Citation on Appeal	.20
	Making Transcript on Appeal, 1100 ffs. at 20c	220.00
	Making copy Transcript on Appeal for printer, 1100 ffs. at 10c	110.00
	Seal and Certificate to Transcript	.70
	Filed Clerk's Accruing Bill Costs	.20
	Filed Receipt for Transcript	.20
		$333.10

Clerk's accruing costs taxed at $333.10.

SOUTHARD HOFFMAN, Clerk.

[Endorsed:] Filed July 31st, 1894.

SOUTHARD HOFFMAN, Clerk.

UNITED STATES OF AMERICA,
Northern District of California. } ss.

I, Southard Hoffman, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and hereunto annexed three hundred and ninety-eight pages, numbered from 1 to 398 inclusive, contain a full, true and correct transcript of the record in said District Court in the cause entitled, "Henry F. Smith and Geo. C. Smith, Infants, by Eliza A. Smith, their Guardian, and Eliza A. Smith for herself and as Administratrix of the Estate of Henry Smith, deceased, vs. Occidental and Oriental Steamship Company, a corporation," made up pursuant to Rule 52 of the Rules of the Supreme Court of the United States.

Witness my hand and seal of said Court at San Francisco, this 14th day of August, A. D. 1894.

(Seal.) SOUTHARD HOFFMAN, Clerk.

NOS. 191 AND 192.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY,
Appellant,

VS.

HENRY F. SMITH ET AL.,
Appellees.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY,
Appellant,

VS.

ELIZA A. SMITH,
Appellee.

Appeal from the District Court of the United States for the Northern District of California.

Appellant's Points and Authorities.

FILED
OCT 3 1894

W. H. L. BARNES AND
FRANK SHAY,
Proctors for Appellant.

Nos. 191 and 192.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY, *Appellant*, vs. HENRY F. SMITH et al., *Appellees*.	No. 191.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY, *Appellant*, vs. ELIZA A. SMITH, *Appellee*.	No. 192.

Appellant's Points and Authorities.

Upon the 22d day of August, 1888, the steamship *City of Chester* left Broadway wharf, in the city and county of San Francisco, State of California,

bound for Eureka, California. As she neared the Golden Gate she ran into a bank of fog, and shortly afterwards came into collision with the steamship *Oceanic*, inward bound, and was so badly injured that she sank, carrying down with her, among others, Henry Smith and his infant daughter Myrta. Two years later Henry F. Smith and George C. Smith, minors, and Eliza A. Smith, for herself, and as administratrix of the estate of Henry Smith, deceased, brought an action at law in the District Court of the United States for the Northern District of California, to recover from the Occidental & Oriental Steamship Company, the owner of the *Oceanic*, and the Pacific Coast Steamship Company, the owner of the *City of Chester*, $75,275 damages alleged to have been sustained by them by reason of the death of Henry Smith, the father of the minor plaintiffs and the husband of Eliza A. Smith. At the same time Eliza A. Smith brought an action at law in the same court against the same defendants for the recovery of $20,000 damages, alleged to have been sustained by her by reason of the death of her infant daughter, Myrta Smith. Both actions were brought under the provisions of the Code of Civil Procedure of the State of California. To the complaint first mentioned this appellant demurred upon the grounds of a misjoinder of parties plaintiff; that said complaint did not state facts sufficient to constitute a cause of action; that several causes of action had been improperly united, and that said complaint was ambiguous, unitelligible and uncertain (transcript, page 15 *et seq.*) Said demurrer was overruled, and

in due time said cause came on for trial. The defendant, the Pacific Coast Steamship Company, took advantage of the "Limited Liability Act," abandoned the wreck of its steamship to those claiming damages, and had itself dismissed from both of said actions. At the trial it was agreed between counsel that both cases be tried together, and that separate judgments be entered. When said cases were called for trial, the judge of said District Court raised the point that the District Court of the United States had no jurisdiction to proceed therewith, inasmuch as said actions were, in form, ordinary common-law actions. It was thereupon stipulated by counsel for the respective parties "that "these actions, and each of them, are and is a proceed- "ing in admiralty *in personam;* all objections or "exceptions to form of summons or citation, or "objections to pleadings, as not being in accordance "with the admiralty rules and practice of this court, "are and is hereby waived; and that the causes may be "tried and determined in the same manner and with "the same effect as if citation had been issued in each "case, instead of summons, and the proceedings were "in all respects conformable to the rules of this court "in admiralty" (transcript, pages 33, 34).

The trial of the cases was thereupon proceeded with, and in due course the matters were submitted to the Court for decision. On April 23, 1894, decrees were entered in the case of *Henry F. Smith et al.* vs. *O. & O. S. S. Co.*, in favor of libelants for $10,000 and costs, and in the case of *Eliza A. Smith* vs. *O. & O. S. S. Co.*, in favor of libelant for $1,000 and costs. From each decree the O. & O. S. S. Co. appealed.

The theory upon which plaintiffs attempted to make out a case against this appellant was that, although the management of the *City of Chester* was negligent, yet that of the *Oceanic* was equally so. The defense set up was that there was no negligence upon the part of the officers or crew of the *Oceanic*, but that the collision was due to the careless management of the *Chester*, and to the fact that she became unmanageable in the flood tide then coming in from the ocean.

Mr. Smith and his daughter were passengers upon the *City of Chester*. As a carrier of passengers, the owners of the *Chester* owed these passengers certain duties, and in the discharge thereof were bound to exercise the utmost care and prudence. No such duty was owed them, however, by the owners of the *Oceanic*. The latter were bound to exercise towards the *Chester* and its passengers only ordinary care. No presumption of negligence arose, as against the *Oceanic*, merely because a collision occurred between the two steamships which resulted in the drowning of Henry Smith and his child.

Tompkins vs. *R. R. Co.*, 66 Cal., 163.
Lindall vs. *Bode*, 72 Cal., 245.
Schmidt vs. *Bauer*, 80 Cal., 565.
Shearman & Redfield on Negligence, p. 10.

In order to maintain an action for injuries to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled, and this cannot be inferred from

the mere fact of the occurrence of the accident which caused the injury.

Sweeny vs. *R. R. Co.*, 10 Allen Rep., 372; S. C., 87 Am. Dec., 644.

In order to make out a case against the *Oceanic*, it was incumbent upon plaintiffs to prove, by a preponderance of evidence,—actual negligence (the *Joseph Stickney*, 56 Fed. Rep., 156),—the commission of some act which should not have been committed, or the omission to perform some duty which should have been performed, and which act of commission or omission was the direct or proximate cause of the injury complained of. Of such proof there was a total failure in the cases now before the court. There was no proof whatever adduced showing negligence upon the part of the management of the *Oceanic*. On the contrary, the evidence clearly showed the exercise by the officers of the *Oceanic* of great care and caution, and the prompt adoption by them of every means in their power to avert the catastrophe.

The master and pilot of the *Oceanic* did all that reasonable prudence required them to do under the circumstances. To use the language of the U. S. Supreme Court in the *Nevada*, 106 U. S. Rep., 157: "Perhaps "they might have done something else which would "have been better. The event is always a great "teacher. * * * But these possibilities are not "the criteria by which they are to be judged. The "question is, Did they do all that reasonable prudence "required them to do under the circumstances? And

" this question, we think, must be answered in the " affirmative."

The navigation laws of the United States lay down certain rules which must be observed by vessels. Article 12 provides that a " a steamship shall be pro- " vided with a steam whistle or other efficient steam " sound signals, so placed that the sound may not be " intercepted by any obstructions. * * * In fog, " mist or falling snow, whether by day or night, the " signals described in this article shall be used as fol- " lows, that is to say :

" (*a.*) A steamship under way shall make with her " steam whistle or other steam sound signal, at inter- " vals of not more than two minutes, a prolonged blast." * * *

Article 13 provides that " Every ship, whether a sail- " ing ship or a steamship, shall, in a fog, mist or falling " snow, go at a moderate speed."

Article 18 provides that " Every steamship, when " approaching another ship so as to involve risk of col- " lision, shall slacken her speed, or stop and reverse, if " necessary."

Article 19 provides that " In taking any course " authorized or required by these regulations, a steam- " ship under way may indicate that course to any other " ship which she has in sight by the following signals " on her steam whistle, namely :

" One short blast to mean, ' I am directing my course " ' to starboard.'

" Two short blasts to mean, ' I am directing my course " to port.'

"Three short blasts to mean, 'I am going full speed "astern.'

"*The use of these signals is optional, but, if they are "used, the course of the ship must be in accordance with "the signal made.*"

It was in evidence that the proper and usual course pursued by steamships entering the harbor of San Francisco was by the North Head and along the northerly side of the channel, and that the proper and usual course pursued by steamhips outward bound was along the southerly side of the channel.

There is very little dispute in the evidence as to the facts connected with the collision between the two steamers. The testimony, as a whole, shows a strict compliance with the navigation laws upon the part of the *Oceanic.*

The evidence proved that the *Oceanic* arrived off the port of San Francisco on the morning of August 22, 1888; that the weather was foggy; that as the steamship entered the harbor its officers and crew were at their proper stations; that an efficient lookout was kept and proper discipline maintained; that the proper fog signal was given and had been given by blasts of the steam whistle sounded at intervals of less than a minute for several hours preceding the collision with the *Chester;* that, for several hours preceding said collision, the speed of the *Oceanic* had been moderate, ranging from half speed to slow, dead slow, and with occasional stops; that, for eleven minutes before the collision, the *Oceanic* had been proceeding "dead slow," with just sufficient movement of her engines to main-

tain steerage way; that when near Point Diablo, in the bay of San Francisco, the master and pilot of the *Oceanic* saw the *Chester* looming up through the fog and at a distance of half a mile; that the *Chester* was moving at full speed; that she was two and a half points off the starboard bow or right-hand side of the *Oceanic;* that immediately thereupon, pursuant to the rules of navigation, the master of the *Oceanic* sounded two blasts of the steam whistle, which meant, "I am "going to starboard my helm and pass to the left; you "do the same;" that at the same time the helm of the *Oceanic* was put hard starboard; that the master of the *Chester* answered said signal with two blasts of his steam whistle, which meant that the *Oceanic's* signal was understood, that the helm of the *Chester* would be put starboard, and that the vessel would also go to the left; that had the *Chester* acted on her starboard helm, as she had signaled she would do, the two vessels would have safely passed each other; that shortly after the first interchange of signals the *Oceanic* again sounded two blasts of her steam whistle, indicating that she was still starboarding her helm and going to the left, and that the *Chester* again answered with two similar blasts, indicating that she understood the *Oceanic's* signal, would starboard her helm and go to the left; that if, after such second interchange of signals, the *Chester* had starboarded her helm and gone to the left, as agreed, the vessels would have passed each other safely, and there would have been no collision; that immediately after such second interchange of signals the master of the *Oceanic* observed that the *Chester* was not

passing to the left, pursuant to signal, but bore down upon the *Oceanic* as if under the influence of a port helm; that at the time such fact was observed, immediately upon said second interchange of signals, the master of the *Oceanic* ordered the engines of the vessel to be put to "full speed astern," and that this order was immediately obeyed; that said order was given and obeyed about two minutes before said collision; that at the time of the giving and obeying of said order the *Oceanic* was going "dead slow;" that at the time of the collision the *Oceanic's* headway had been stopped, and that she was beginning to move backward; that at that time the backwash from the propeller was coming forward and reached a point between the funnel and the bridge of the *Oceanic*; that the *Chester* slewed or swung around and struck the prow of the *Oceanic* and was so injured that she sank.

Practically the only conflict in the testimony is as to the exact location of the point of collision. The officers and pilot of the *Oceanic* and the witnesses called by the defense show that the collision occured in the neighborhood of Lime Point, on the northerly side of the channel. The evidence of these witnesses proves that the *Oceanic* passed the tug *Relief* and the *British* ship *Lord Wolseley* about two miles outside of Point Bonita an hour or more before the collision; that her course was then a northeasterly one; that she maintained that course, pointing for the northerly shore of the Golden Gate; that she passed into the Golden Gate from a quarter to a half mile from Point Bonita; that the officers of the *Oceanic* could see the loom of the land at Point Bonita

through the fog; that she passed within a quarter of a mile of Point Diablo, and that the officers of the *Oceanic* could see the land at that point down to the water's edge and for 20 feet above it; that they could see Lime Point; that they could not see any object on the southerly shore of the Golden Gate or the bay of San Francisco; that it was usual and proper for vessels entering the harbor of San Francisco, on a flood tide, to come in on the northerly side of the channel; that the *Oceanic* came into port at a moderate speed; that she was carefully, prudently and ably handled and navigated; that her machinery, appliances, steering gear and equipments were in first-class order and condition.

Upon the other hand, some of the officers and passengers upon the *City of Chester* testified that the collision occurred upon the south side of mid-channel.

The evidence proved that the *Chester* left her dock at about 9:15 A. M.; that after getting straightened out and headed down the bay her engines were going "full speed ahead;" that she encountered fog when opposite Black Point, and began sounding her fog signal; that she heard and responded to the two-blast signal sounded by the *Oceanic*, indicating that she would starboard her helm and go to the left; that she responded to the second two-blast signal from the *Oceanic*, indicating that she understood the signal, could and would obey it and go to the left; that she was a vessel of 1,100 tons register; that she had on board only 120 tons of freight and 115 passengers and a crew of 32 men; that a strong flood tide was running into the harbor of San Francisco, through the Golden Gate; that this flood tide struck

the ocean shore below Fort Point and caused a tide-rip which caused a powerful current, with a velocity of five or six miles an hour, to set across the channel in the direction of Lime Point; that when the *Chester* was opposite Fort Point, and immediately before the second interchange of signals between the two vessels, the bow of the *Chester* was struck by said tide-rip, and that vessel was swung around, headed across the channel, and thrown by the force of the current across the bow of the *Oceanic*.

The testimony further showed that there was no confusion or misunderstanding on the part of the master of either vessel with respect to the signals interchanged; that the master of the *Oceanic* believed that the master of the *Chester* could and would do as he had agreed to do, viz., starboard his helm and go to the left; that there was nothing in the situation or in the conduct of the *Chester* to cause the master of the *Oceanic* to think that the *Chester* could not or would not mind her helm and go to the left, until after the second interchange of signals; that as soon as it became evident that the *Chester* was not complying with the signals, and that a risk of collision might reasonably be apprehended, the master of the *Oceanic* reversed his engines, caused them to go full speed astern, and endeavored, by every means in his power, to avoid the danger.

The learned judge of the court below found that the officers of the *Oceanic* were at fault in not stopping and reversing as soon as the *Chester* came in sight, about two minutes before the collision. At that time, however, there was no danger of collision, and the rule

is not that the engines of a steamship must be stopped and reversed when another vessel comes in sight, even though pointing towards her, but only when there is risk of collision. The testimony is uncontradicted that when the two steamships came within sight of each other the *Oceanic* sounded two blasts of the whistle, that the *Chester* responded with two blasts, that a moment or two later these signals were repeated, that *immediately* after the second interchange of signals the *Oceanic* stopped and reversed.

Attention is called to the testimony of Captain Meyer, the pilot (trans., p. 73 *et seq.*), as to when there was any danger of collision.

"Q. If the *City of Chester* had obeyed the signal "that you gave to starboard the helm, that would have "sent both ships to port and made you pass with the "starboard side of each to the other?

"A. Yes, sir.

"Q. If, when you gave the first signal, she had gone "to starboard and answered your signal, was there any "danger of collision?

"A. Never.

"Q. If, when you gave the second two blasts, mean- "ing 'we are going to the left,' and he answered he "had gone to the left, if he had minded his helm, then "was there any danger?

"A. I think there was no danger.

"Q. Just as soon as you saw that there was danger, "because she was not minding her helm, I understand "you, say you gave the order to your ship to go full "speed astern?

"A. Yes, sir.

"Q. Was that order obeyed?

"A. Right away."

Captain Metcalf's testimony upon the same point is as follows (trans., p. 135):

"Q. If, at the time the first signal to go to the left "was given and responded to by the *City of Chester*, "she had gone to the left and you had gone to the left, "or kept on your course, was there then the slightest "degree or possibility of a collision between those "vessels?

"A. Not any. The *City of Chester*, if she had "altered her course to the left one point, would never "have touched the *Oceanic*.

"Q. When the second signal was given to go to the "left, if she had then—after responding to your signal "that she would go to the left—had, in point of fact, "gone to the left, would there have been any collision "possible between those ships?

"A. None, sir.

"Q. I understand you to say that immediately upon "perceiving that, notwithstanding she had under-"stood both your signals and responded to both signals, "she was still not going to the left, but was continuing "on the right. What did you do?

"A. Put the engines full speed astern."

Second Officer Bridgett, of the *Oceanic*, testified as follows (trans., p. 269):

"Q. If, when the first interchange of signals took "place, the *City of Chester* had been turned to the left

" and had minded her helm, would there have been any
" danger of a collision?

" A. No, sir, impossible.

" Q. If, when the second interchange of signals took " place, the *City of Chester* had acted as indicated by " the signals, would there have been a collision?

" A. No, sir; I do not think there would."

This testimony was not only not contradicted, but no attempt was made to impeach it. By it is fixed the time when there was danger of collision, within the meaning given to that term by the rules of law. While it may be said that there is always danger of collision where two vessels are approaching or even passing each other, yet, in order to throw upon one vessel or the other the duty of taking active measures to avoid striking the other, there must be an apparent risk as the term is defined by the courts.

In the *Free State*, 9 U. S., 200, which was a case of collision between a steamer and sailing vessel, both navigating in the ascent of the Detroit river, it was held that when a steam vessel is approaching another vessel, and where a collision *may be produced by a departrre of the latter from the rules of navigation*, that the former is not bound to slacken her speed or stop and reverse. Each vessel may assume that the other will reasonably perform its duty under the laws of navigation; and if, upon this assumption, there could be no collision, the case under the sixteenth article, *i. e.*, that every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or, if necessary,

stop and reverse, and every steamship shall, when in a fog, go at moderate speed, does not arise. *The steamer is not bound to take measures to avoid a collision until some danger of collision is present.*

The *Peerless*, 48 Fed. Rep., 844, was a case of collision between the steam tug *Thomas Y. Boyd* and the steam yacht *Peerless*. The latter met the former in the east channel of Hell Gate. On seeing the tug the yacht gave one whistle and ported her helm. The tug immediately responded with one whistle but did not alter her wheel. As soon as the yacht saw the tug did not change her course, she reversed, but too late to avoid the tug, which was sunk. It was held by Brown, J., that the yacht had the right to take the east channel, and her navigation was without fault; that the cause of the collision was the failure of the tug to alter her course in accordance with the whistle, which there was nothing to prevent her from doing, and she was consequently solely liable for the collision. Brown, J., said: " * * * the evidence shows that * * " when the exchange of one whistle was made there " would have been no difficulty in passing the tug had " the tug observed her duty. *The yacht had the right " to assume that the tug would go to the right*, *as her " whistle and the rule required.* As soon as the whistles " were exchanged the yacht did all that was required of " her in porting her wheel; for there was time enough " and space enough for the tug to go to the right. I " am satisfied that the yacht backed as soon as she " could perceive that the tug was not doing her duty.

" *She was under no obligation to stop and back as soon*
" *as the exchange of one whistle was made, because that*
" *exchange of whistles was a suitable and sufficient*
" *provision for avoiding the collision, had the tug per-*
" *formed her part. That exchange of whistles for the*
" *time being, therefore,* DETERMINED THE RISK OF COL-
" LISION, as the yacht had the right to assume; and, as
" soon as risk of collision could reasonably be appre-
" hended anew, the yacht reversed. This was all that
" was required of her by the rules or by common sense
" and prudence. The collision being, therefore, the fault
" of the tug, the libel must be dismissed with costs."

In the *Thingvalla*, 48 Fed. Rep., 768, the Circuit Judge said, in speaking of the duty of the *Thingvalla* as soon as she saw the *Geiser* was not doing her duty: "Looking at the situation after the event, it may be
" apparent that such a change of course would have
" avoided the collision; but the *Thingvalla's* navigation
" must be judged by the knowledge she had, or ought
" to have had, at the time. * * * Whether she
" would realize that fact (violation by the *Geiser* of
" crossing rule) and alter her helm accordingly the
" navigator of the *Thingvalla* could not know. An
" attempt on his own part to abandon his course, which
" the rules enjoined upon him in the one case and per-
" mitted him in the other, might, so far as he knew,
" tend to produce the very mishap it was intended to
" avoid, by co-operating with a belated effort on the part
" of the *Geiser* to return to her true course, and he
" cannot, therefore, be held in fault for taking the

"chance. He did what the rules required of him: "when seeing the mistaken maneuver of the *Geiser* he "stopped and reversed. There is nothing in the sug- "gestion of improper speed or insufficient lookout. "The vessels sighted each other at sufficient distance "to avoid collision without any difficulty, had there not "been improper navigation of the *Geiser* after sight- "ing."

In the *Greenpoint*, 31 Fed. Rep., 231, which was a case of collision between the steamers *Grand Republic* and the *Greenpoint*, the Court says: "I cannot "find upon the proofs any satisfactory evidence of "fault in the *Greenpoint*. She could not tell precisely "what the *Grand Republic* was able to do in her "maneuvers. As soon, I think, as the danger of col- "lision was apparent, the *Greenpoint* stopped and "reversed. She did so as soon, I think, as could "reasonably have been judged necessary, considering "what the *Grand Republic* at first would be presumed "able to do. For a certain time the *Greenpoint* had a "right to rely upon the ability of the *Grand Republic* "to do what she undertook to do, viz., go ahead with- "out injury to the *Greenpoint*."

In the case of the *Ulster*, 1 Maritime Law Cases, 234, Lord Chelmsford, in the Privy Council, says of the *Tagus*, which, though crossing the Mersey, was intending to turn down the stream, that the *Ulster* "was entitled "to take for granted that the *Tagus*, intending to turn "her head down the river, would resort to all the means "proper for the purpose, and would have no difficulty

" in succeeding in her object. The *Ulster* pursued the
" safe and proper course of not shifting her helm, under
" the reasonable expectation that the *Tagus* would do
" what she evidently proposed to do, and which she had
" the means at command of accomplishing."

See also

The *Argus*, Olcott, 313.
The *Baltic*, 2 Ben., 98.
The *Servia*, 30 Fed. Rep., 502.
The *Noordland*, 13 Supreme Ct. Rep., 817.

In the last case the Supreme Court of the United States, April 1893, says: "The *Servia*, therefore, had a
" right to assume that the *Noordland* would head
" down the river, and proceed to sea. It became the
" duty of the *Servia* only to proceed carefully on her
" course, keeping watch of the *Noordland*. No danger
" was apparent. The *Servia's* course was well clear of
" the *Noordland*, and of the course which the *Servia* had
" the right to believe the *Noordland* would promptly
" take (Mars. Mar. Coll. [ed. 1880], 233; the *Ulster*,
" 1 Marit. Law Cas., 234; the *Scotia*, 14 Wall., 170; the
" *Free State*, 91 U. S., 200; the *Rhondda*, L. R. 8 App.
" Case, 549; the *Jesmond* and the *Earl of Elgin*, L. R.
" 4 P. C. I.

" The *Servia* stopped her engines when she got near
" enough to see that the *Noordland* continued to make
" sternway, and when about one thousand feet away
" from her, and immediately afterwards the *Servia* put
" her engines at full speed astern, and ported her helm.
" It then appeared to the *Servia* that the *Noordland*, in
" violation of the usage and of her duty, was proposing

" to maintain her sternway so as to bring her across
" the path of the *Servia*, and that there was danger of
" collision. Then it became the duty of the *Servia* to
" take measures to avert a collision, which she did, as
" above stated.

" The Circuit Court held that the *Servia* was not
" guilty of fault or negligence contributing to the col-
" lision. This is a proper conclusion from the findings
" of fact that she was properly officered, manned and
" equipped; that those in charge of her exercised
" proper vigilance in observing the *Noordland*; that
" the *Servia* was well over towards the New York
" shore, leaving ample room for the movements of the
" *Noordland*; that the *Servia* was under slow speed;
" that she stopped her engines as soon as she saw that
" the *Noordland* was under sternway, although her
" engines had been stopped; and that the *Servia* put
" her engines at full speed astern as soon as she saw
" that such sternway of the *Noordland* was continuing
" so as to indicate danger of collision. The *Servia*,
" therefore, complied with all the requirements of the
" law.

* * * * * * * * *

" The *Servia* maintained her position close to the
" New York shore. She proceeded slowly. She
" observed the *Noordland* closely. She stopped her
" engines when at a safe distance to enable the
" *Noordland* to check her own sternway, and she
" reversed her engines when the sternway of the
" *Noordland* indicated risk of collision. She was
" thwarted in her maneuvers by the faults committed

" by the *Noordland.* It was not incumbent upon the
" *Servia* to take any other precautions than she did,
" and she did nothing to bring on the risk of collision."

The foregoing authorities seem to settle the question as to the duty of the *Oceanic* under the conditions here presented.

The learned judge of the court below seemed to be of the opinion that it was the duty of the master of the *Oceanic* to know the exact location of the tide-rip into which the bow of the *City of Chester* passed, and the effect which that tide-rip would or should have had on the *Chester.* It is in evidence that the *Oceanic* was coming into port on a return voyage from China and Japan, and that there was a fog hovering over the bay of San Francisco. It is clear that the master of that vessel did not know the condition of the *Chester* or anything as to her ability to take care of herself, and that the only information that he had upon that point was derived from the signals given by the *Chester;* and these indicated that that vessel could be and would be navigated in a manner which would enable both vessels to proceed in safety.

We contended in the court below, and we contend here, that the irresistible force claimed for the tide might concern the *City of Chester* but did not involve the *Oceanic.* The master of the *City of Chester* knew where it was with reference to the set-off from Fort Point of the young tide; and the master of the *Oceanic* did not know. He supposed that the *Chester* would pass the *Oceanic* on her right—the *Chester* passing to the left,

going out. The master of the *Chester* signaled that he would adopt this navigation presumably in view of all the contingencies which affected the *City of Chester*, its steam power, its ability to mind its helm, its propeller, and the knowledge of its officers of the condition of the tide, and we contend that these considerations were for the *City of Chester's* officers and not for those of the *Oceanic*. The court permitted questions to be put to the officers of the *Oceanic* on this subject, and they were answered. Captain Metcalf was asked:

" Q. Did you make any allowance in your arrange-
" ments for passing the *Chester* for the sheer that this
" tide would give her?

" A. I most certainly did not, because I did not know
" the position of the *City of Chester* with reference to
" that tide. It would be absurd for me to make any
" possible arrangements for her navigation when I
" could not tell her position with reference to that tide.
" If the captain of the *Chester* was satisfied that that
" tide would prevent him acting on his starboard helm,
" it was his duty to signify that to me by the danger
" signal, or by going astern, and I would have done the
" same. I relied upon the seamanship of the captain of
" the *City of Chester* carrying out the whistle signal
" that we had given and was answered."

Again: " Q. Putting all this information with your
" knowledge of the direction that this tide ran, did you
" not know that the *Chester* would be caught in that
" tide?

" A. Assuming the position of the *Chester* to be
" half a mile from me on my starboard bow when the

" first signal was given, she was not within the influ-
" ence of that tide-rip in the neighborhood of Fort
" Point. If her helm had been starboard then, which
" is usually done by every steamer going out of the
" port on flood tide in order to make that rip, she would
" have recovered herself very quickly and gone on her
" business."

To another similar question the same witness replied: " Mr. White, I could not estimate the position of the " *Chester* so closely as to tell when she would cross that " particular rip. The tide sets across there in a dis-" tinct line. It was impossible for me to look out for " my ship and my navigation, and, watching the " *Chester*, to tell when she was approaching that line " with sufficient certainty to base my own action on it."

Captain Metcalf is a man of far more than average intelligence. He had been a master marinerfor twenty-eight years at the time of the collision, and had commanded the *Oceanic* at least eleven years. It was conceded that she was sufficiently well found and equipped in every respect. It was conceded that she came into port fully complying with all the rules of navigation regulating the conduct of a steamship under way in a fog. She was proceeding with speed just sufficient to subject the vessel to the command of her helm. She had competent lookouts properly stationed and vigilant in the discharge of their duties; she gave constant fog signals, and had ability to promptly change her course. She was guilty of no negligence in these respects.

The *Colorado*, 1 Otto, 692.

The *Franconia*, 4 Bened., 181.

The *Hansa*, 5 Bened., 581.

It is not claimed that the *Oceanic* could have seen the *City of Chester* any sooner than she was observed. It is not claimed that the *Oceanic* was proceeding to enter the harbor in such a way as by her position to endanger outbound vessels under steam. The position and course of the *Oceanic* was abundantly established by the testimony of her officers and the pilot, Louis Meyer. The reason of her course was fully explained by Captain Metcalf. There was no question raised as to the correctness of the captain's statement that the north side of the bay was that which an incoming steamship should properly and ordinarily does take; and her course from the whistling buoy to Point Diablo was testified to by those who alone could best know. Notwithstanding the effort made to show the effect of the tide upon a tugboat floating in the flood tide, the fact remained that the *City of Chester's* position at the bottom of the bay was in accordance with the evidence given by the officers and pilot of the *Oceanic*. The testimony of Captain T. P. H. Whitelaw and that of Second Officer Bridgett is conclusive on this question; and Mr. Westdahl conceded at the close of his examination that if the position of the *City of Chester* is where Whitelaw located her on the day of the disaster, and which he and Second Officer Bridgett, two years later, verified by actual soundings, then the collision itself must have occurred where the officers of the *Oceanic* locate it.

As to what occurred on the *City of Chester* prior to and at the time of the collision:

Clitus Barbour, a passenger on the *City of Chester*, called by plaintiff, said: "I was on the left side * * * "I looked up and saw apparently across the way or "across the bows of the steamer I was on a large "steamship probably a couple of hundred yards away. "*The next I knew, we crashed into it.* There was a dull "thud, a bump, reminding me somewhat of the bumps "that ferry-boats have when they strike the piers. "* * * They were not crossways exactly. * * * "*It appeared to me as if our boat was trying to run* "*round the end of them and missed it and struck.* "*The other steamer appeared to be coming under a* "*very slow headway, as near as I can remember.* "*I was looking closely at it, too. I did not think of* "*any collision.*" This is the inartificial story of a landsman. In its way it is the counterpart of that related by the officers and pilot of the *Oceanic.* They say the *City of Chester* came along as though she was under the influence of her port helm. "She came right "along and struck the *Oceanic* right in the bow" (testimony of Second Officer Bridgett).

We have no disposition to discuss or criticise the testimony of the officers of the *City of Chester*; but we contend that it in no respect tends to contradict that of the officers and pilot of the *Oceanic*, except as to the point of contact between the vessels. As to this, we are satisfied that the preponderance of the evidence will be found to be in favor of this appellant.

We contend that the evidence shows that the *Oceanic* was navigated in full subordination to the rules of navigation, and with all reasonable prudence under the

circumstances: That the collision was caused by the *City of Chester* having been caught in the eddy tide off Fort Point, and the flood tide taking her on her port bow caused her to run against her starboard helm and across the bows of the *Oceanic;* that when the danger was observed the *Oceanic* promptly stopped and reversed, and that the whole case fails to show that the defendant was guilty of any wrongful act, neglect or default towards the plaintiffs or the deceased persons whom they represent.

The opinions of all the nautical men on board the *Oceanic* concurred that the *Oceanic* was properly and safely navigated in every respect, and that all was done by her officers and pilot that could have been done, under the conditions present, to avoid the collision. This view is, of course, subject to the usual and obvious criticism that, while without interest in the result of the action, or any other imaginable interest for that matter, except that of their reputation as navigators, they are testifying in their own exculpation. Yet we submit that their opinions are entitled to careful consideration. Whether it would have been possible for the *Oceanic* to have prevented the accident by other means than those adopted is a question which certainly involves great professional knowledge; and the Court is to judge of the value of the opinions given under oath of these experts, as well as of the value of the evidence upon which they are founded. They may, perhaps, assist the Court in determining the questions involved here, founded as they are upon facts within their great experience, and not upon mere theory or abstract reasoning.

But the testimony of the officers and pilot of the *Oceanic* as to what occurred on board of her is entitled to full credit. The established rule is that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who form or judge opinions merely from observation, *a fortiori* when their testimony is wholly uncontradicted.

The *Alexander Folsom*, 52 Fed. Rep., 403.
The *Hope*, 4 Fed. Rep., 89.
The *Wiman*, 20 Fed. Rep., 248.
The *Alberta*, 23 Fed. Rep., 807.

The testimony of the captain and officers of the *City of Chester*, except with respect to the precise location where the disaster occurred, does not tend to contradict that of the officers of the *Oceanic.* In fact it is rather corroborative thereof. The *City of Chester* in going out to sea intended, doubtless, to hug the southern shore of the bay. It was, says Captain Wallace, the usual course of outward-bound steamships. The weather was moderately clear for some distance, and the *Chester* ran at full speed. Near the Presidio she passed into the fog. He says that he then went at half speed. He does not claim that the flood tide acting against his starboard helm carried him across the bay and into the *Oceanic.* This action was voluntary on his part, if he is to be believed. He says: "Then it got very thick, "and just at that time I heard a steamer *outside of us.* "*She seemed to be right ahead. She blowed two whistles,* "*and I answered with two.* I will state that before that

" we had slowed the ship down before where we ran into
" where it was very thick and proceeded on; and a little
" further down *I heard this ship blow two more whistles.*
" *I answered them with two whistles. I put my helm the*
" *first thing hard to starboard when I heard the first*
" *whistle.* I had not seen anything of the ship at that
" time. I saw the spar buoy off Fort Point about 100
" or 150 feet off our port bow, and I immediately saw
" that it was an utter impossibility with the helm hard
" a-port to clear the *Oceanic.* I rang the indicator full
" speed astern *and let the flood tide take her bow, her*
" *stern being still in the eddy, and let her swing right*
" *around*, and in less than two minutes she crashed into
" us and cut us more than half way in two."

Rufus Comstock, engineer on board the *City of Chester*, said: " We left Broadway wharf at 9.05, I
" think, and ran full speed until about quarter to ten,
" and *then we slowed down to half speed*, and *about a*
" *minute or a minute and a half after that we got a bell*,
" '*full speed astern.*' "

Ferdinand Westdahl was called by plaintiffs as an expert navigator. He detailed some experiments made by drifting the *Gipsey* in the tide on September 5, 1888, to determine the position of the *City of Chester* at the time of collision, and undertook to show how that wounded and water-logged steamer would have drifted, from the place where Captain Wallace located the collision, before she would sink. He made several attempts on September 5, 1888. The tide when he experimented *was nearly full.* His reference to the tide books showed that on August 22, 1888, it was low water at 5.53 A. M.,

and high water at 12.53 noon. On September 5th, it was low water at 4.40 A. M., and high water at 11.29 A. M. His observations began at 10.19 and ended at 10.56 A. M. On September 10, 1888, he tried to locate the wreck. He placed it some distance north of the 40-fathom mark, shown on the chart. It will be noticed that his experiments were made at a different state of the tide from that which existed when the collision occurred, and for that reason, if no other, were valueless. All he could say was that, *if* the tide was exactly the same at the time of the collision as it was when he went floating around on the little *Gipsey*, the collision between the two ocean steamships must have occurred one-third of the way between Fort Point and Lime Point, if not farther! His examination did not prove that he ever found the wreck. His statement was: " And we swept along the bottom with a line weighted " with great bars and window weights *until we finally* " *caught on to what we supposed was the City of Chester* " *—the wreck of her.* I determined where she was then, " or where was *what we supposed to be the City of* " *Chester!*" But he knew nothing of the depth of water in which his supposed find lay. He made no soundings. When asked on cross-examination where the collision occurred,—assuming that the *Chester* was adrift six minutes before she sunk, and that she now lies where Captain Whitelaw, the wrecker, located her on the day of the accident, and where Whitelaw and Bridgett two years later found her without difficulty,—he said that the collision must have occurred just about where all the officers or the *Oceaaic* assert that it happened.

We submit that the testimony of this witness does not tend to establish even a contradiction of that furnished by the defendant as to the location of the *City of Chester*, or the plaee of the collision. Captain Whitelaw was perfectly sure that a line commencing at Point Bonita light, and protracted through Point Diablo, intersects the wreck. He located the wreck and established this line the very day of the collision. He said: "I am "positive of that line because I ran down after it had "been drawn two years. I edged over here [showing] "until I got that in line, and steamed down slowly "until I opened a range here [showing]. The very "moment I saw the bow of the boat cross the range, "I ordered the tug to stop, and the moment she settled "back, as it was flood tide, I dropped the lead and *hit* "*the wreck at once.*

"*By the Court*—From the bearing of the land and "the sea, was the wreck nearer to Lime Point than it "was to Fort Point?

"A. Yes, sir; it is about three-fifths of the distance "towards Lime Point, and two-fifths from Lime Point "this way. It was three-fifths from the San Francisco "shore towards Lime Point, and I estimated two-fifths "of the distance from Lime Point this way [pointing].

"*By the Court*—Q. She is nearer to Lime Point than "she is to Fort Point?

"A. Yes, sir.

"Q. By this proportion?

"A. Yes, sir."

We repeat, there can be no reasonable doubt, it seems to us, that the witnesses, mariners and lands-

men, who swear that the *Oceanic* came in on the south side of the bay, and collided with the *City of Chester* close to the shore on that side, are totally in error, because:

1. The *Oceanic* came in shaping her course for the North Head;

2. The north side of the entrance was the side usually taken by steamships entering the harbor in foggy weather. The south side was usually taken by outbound steamers;

3. She picked up the whistle at Bonita Point;

4. She steered for the nine-fathom buoy, and kept on the north side of mid-channel;

5. She passed within hailing distance of the British ship *Lord Wolseley*, at anchor *two miles from the North Head, north of mid-channel.* The position of the *Lord Wolseley* is marked "B" on the chart in evidence, and was fixed by Captain McLaughlin of the tug *Relief* (trans., p. 285);

6. She passed in sight of the high land on Point Bonita;

7. She passed in plain sight of Point Diablo, one-quarter of a mile away;

8. The wreck itself lies directly in this line of progress.

We submit that if any fact in this case is proven, not merely by a preponderance of testimony, but beyond a reasonable doubt, it is that the collision occurred where this appellant claims that it did.

If this be so, then the inference is irresistible that the risk of collision and the collision itself were both wholly

chargeable to the conduct of the *City of Chester*; that, instead of going down the bay and out to sea, the *City of Chester* was going nearly straight across the channel.

We submit that the facts alleged in the answer of the Occidental & Oriental Steamship Company are fully proven by the evidence, and demonstrate that the defendant, the Occidental and Oriental Steamship Company, was, in respect to the collision between the *Oceanic* and the *City of Chester*, occurring August 22, 1888, not guilty of negligence of any description which contributed to the disaster of that day,—was guilty of no wrongful act, neglect or default which caused the deaths of Henry Smith or his daughter Myrta.

W. H. L. BARNES AND
FRANK SHAY,
Proctors for Appellee.

Nos. 191 and 192.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY,
Appellant,
VS.
HENRY F. SMITH ET AL.,
Appellees.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY,
Appellant,
VS.
ELIZA A. SMITH,
Appellee.

FILED
OCT 18 1894

Appeal from the District Court of the United States for the Northern District of California.

POINTS AND AUTHORITIES OF APPELLEES.

CLINTON L. WHITE, AND
WILLIAM H. COBB,
Proctors for Appellees.

Nos. 191 and 192.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

OCCIDENTAL AND ORIENTAL STEAMSHIP COMPANY, *Appellant,* vs. HENRY F. SMITH, et al., *Appellees.*	No. 191.
OCCIDENTAL AND ORIENTAL STEAMSHIP COMPANY, *Appellant,* vs. ELIZA A. SMITH, *Appellee.*	No. 192.

BRIEF OF APPELLEES.

(The references to pages of the record are to printed record in case 191.)

The above entitled actions were brought in the United States District Court pursuant to Sections 376 and 377, respectively, of the Code of Civil Procedure of the State of California, which provide that when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death.

The causes were tried in the District Court as Proceedings in Admiralty *in personam,* a stipulation having been entered into that all questions as to form of summons, etc., were waived (p. 27). On April 23d, 1894, decrees were entered in the District Court in favor of libelants, in Case No. 191, for $10,000 and costs, and in Case No. 192 for $1,000 and costs. From each of these decrees the Steamship Company appealed to this Court. The cases can be heard together.

On the morning of August 22d, 1888, the steamships *City of Chester* and *Oceanic* collided in the entrance of the Bay of San Francisco and the *City of Chester* was sunk, and a number of people were drowned, among others, Henry Smith and Myrta Smith, who were passengers on the *Chester.* Henry Smith was the husband of Eliza A. Smith and the father of the other appellees, and Myrta Smith was the infant daughter of Eliza A. Smith. The appellant was the owner of the steamship *Oceanic,* and the Pacific Coast Steamship Company was the owner of the steamship *City of Chester.* The latter company was made a co-defendant in

the actions, but availed itself of the "Limited Liability Act" and has been dismissed from the case.

The very able and exhaustive opinion of the District Judge who heard and decided the cases is contained at large in the record (pp. 316 to 365, inclusive). In that opinion the analysis of the testimony is so lucid, the conclusions properly deduced therefrom are so convincing, the statement of legal principles applicable thereto is so plain, and the citations of eminent authorities in support thereof are so pertinent and numerous, that we commend the opinion to the consideration of this Court as something which will be of more assistance in arriving at a correct decision of the cases than will be the briefs and arguments of counsel. In so doing, we desire to remind this Court that the District Judge heard the witnesses testify; that there was some conflict in the testimony; and it will be noticed that frequently the statements of a witness are modified or contradicted even by himself, in subsequent statements. In such cases the rule is that the view taken of the testimony by the lower Court is entitled to great weight. Thus, where the evidence was conflicting as to whether the steamer causing the collision reversed in time, it was held that the findings of the lower Court ought not to be disturbed. (*The Phœnix*, 58 Fed. Rep. 927.)

There is some conflict in the testimony which in some particulars would be difficult, if not impossible, to reconcile. This conflict results largely because of officers of the *Oceanic* testifying, in addition to facts, as

well to their conclusions that everything was done on the part of that ship that could be done, in prudence, to avert the collision. The opinions of these witnesses thus put in evidence ought to have little weight as against the facts testified to by them, with the rules of navigation applied thereto, and remembering the relation of the witnesses to the transaction. The language used by Judge Butler in the *John H. May,* **52** Fed. Rep. 883, is appropriate: "These witnesses are "interested, swearing to exculpate themselves. I "have yet to meet with an instance of collision where "witnesses from the vessel in fault did not testify to a "faithful discharge of their duties and to the faultless-"ness of the vessel." In thus calling attention to the testimony of the officers of the *Oceanic* we do not wish to be understood as questioning the honesty of intention of most of them, but insist that from the point of view which would naturally be taken by them and their desire to exculpate themselves, their *opinions* as to the meritoriousness of their own conduct are so warped as to be practically valueless. Besides, *the facts* testified to by these same witnesses do, as we will point out, fully establish the liability of the *Oceanic.* Counsel for appellant have embodied in their brief considerable testimony of officers of the *Oceanic,* and they have taken those parts most favorable to appellant. We submit that since they are interested witnesses striving to exculpate themselves and their actions on the occasion of the disaster, for that reason the testimony given by them in favor of appellees should control rather than what they say for appellant.

The collision was not the result of inevitable accident, which term, as applied to cases of this nature, is defined to mean "a collision which occurs when both "parties have endeavored, by every means in their "power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of "the accident." (The *Locklibo*, 3 Rob. Ad. 318; *Union SS. Co.* vs. *N. Y.* etc. *SS. Co.*, 24 How. U. S. 313.)

Taking into consideration the state of the weather, the place of collision, state of tide, the time of day, amount of fog, the smoothness of the water, the fittings of the two vessels, and all other facts and circumstances of the case, it is conclusively established that this collision was not the result of "inevitable "accident," and that it might and would have been avoided by a proper degree of nautical skill and management on the part of these vessels.

It must be conclusively presumed that this collision was the result of gross mismanagement on the part of at least one if not both the ships. The appellant contends that such mismanagement and negligence was entirely on the part of the *Chester*, and that the *Oceanic* was free from blame. Without contending it to be conclusively shown that the *Chester* was entirely free from blame, the appellees do contend it to be fully established that the *Oceanic* was at fault. In fact, it is not at all necessary to the case of appellees to establish that the *Chester* was free from fault. If the fault was mutual, the *Oceanic* is liable. And since the case is not one of inevitable accident, the only defense the

Oceanic can contend for is that the *Chester* was solely at fault. There has been a decided failure in appellant's attempted proof on this point.

The accident was such as in the ordinary course of things does not happen if those who have the management use proper care, and this of itself affords reasonable evidence—in the absence of explanation from appellant—that the accident arose from want of ordinary care. The accident was such that its real cause may have been the negligence of appellant, and whether it was so or not was within the knowledge of appellant. In such cases the plaintiff furnishes the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that if defendant does not show where the negligence existed, the real cause was negligence on the part of defendant. (*Mullen* vs. *St. John*, 57 N. Y. 567; *Valkmar* vs. *M. R. Co.*, 134 N. Y. 420; *Scott* vs. *London Dock Co.*, 3 Hurl & C. 600; 1 Shearman & Redfield on Negligence, 4th Ed., Secs. 58, 59 and 60; *Cummings* vs. *National Furnace Co.*, 60 Wis. 612.)

It will be contended by appellant that the foregoing rule does not apply, because there were two parties to this transaction, and that it may well be presumed that the *Chester* and not the *Oceanic* was guilty of the negligence which caused the collision. But, when all the evidence is fairly considered, the doctrine of "*res ipsa* "*loquitur*" fairly applies, because, in addition to mere proof of the collision, the evidence further establishes

that the *Oceanic* ran into the *Chester*—not the *Chester* into the *Oceanic.*

This last-mentioned contention is established by the relative positions of the two ships at the moment of collision. The ships came together almost at right angles—the bow of the *Oceanic* striking the port side of the *Chester* about twenty feet abaft her bow and cutting into her about ten feet (pp. 80, 107, 157, 202, 191, 185). Now ships do not have a lateral motion. Their powers of propulsion are either forwards or backwards.

The fact that the *Oceanic* ran into the *Chester* is further established by the condition and direction of the tide currents at the time and place of collision. The tide tended to carry the *Chester* not against the *Oceanic,* but either towards the north side of the channel or back into the harbor—or perhaps in an intermediate or northeasterly direction. In any view of the testimony, it tended to carry the *Chester* away from instead of toward the *Oceanic.*

That the *Oceanic* ran down the *Chester* is further and conclusively shown by the fact that the bow of the *Oceanic* cut half way through the *Chester*—a wound extending in not less than ten feet. The contention that the *Oceanic* was under sternway at the time of the collision is fully rebutted by the evidence showing with what force she struck the *Chester*. The evidence shows that the *Oceanic* had considerable headway at the time of impingement. (*Union SS. Co.* vs. *N. Y. SS. Co.* 24 How. U. S. 307.)

The contention solemnly advanced by the officers of the *Oceanic* that the *Chester*, by a crab-like method of locomotion, hurled herself sidewisė against the bow of their ship is absurd, and would be amusing were it not advanced with some hope that the Court will accept such a theory of the disaster. The *Chester* was, at the time of the collision, headed in a direction substantially at right angles to the line of direction of the *Oceanic*, and the only two forces operating on the *Chester* were: 1st, her own propeller, which tended to carry her either forward or backward ; and, 2d, the tide, which tended to carry her directly away from the incoming ship.

The collision occurred much nearer to the south than to the north shore. The fact that the collision occurnearer to the south than the north shore is shown by a decided preponderance in the testimony of the witnesses. Those who testify that it was near the south shore are: Captain Wallace (pp. 184, 185, 187, 188 and 195); 1st Officer McCullum (p. 181); 2d Officer Lundine (p. 200); Assistant Engineer Comstock (p. 198); Clitus Barbour (p. 243); Mrs. Sarah Nye (p. 247); Mrs. Eliza A. Smith (p. 220), and J. Rankin (pp. 206, 208, 209). Those who testify that it was nearer to the north shore are: Pilot Myer (p. 94); Captain Metcalfe (pp. 108, 110); 1st Officer Tillotson (p. 257), and 2d Officer Bridgett (p. 278). And we again call attention to the fact that the latter are all interested witnesses, naturally desiring to exculpate themselves and the ship which was under their management. And on further

examination Pilot Myer substantially qualified his first statement on this point, and gave as his judgment that the disaster occurred about mid-channel (pp. 95, 96).

It is significant that although the officers of the *Oceanic* testify as to the direction taken by their ship in coming into the harbor, the location of the vessel at the time of taking this direction is a matter of great uncertainty. Pilot Meyer says: "I boarded the ship "about 8 o'clock A. M., *somewhere to the westward* of the "whistling buoy, and when the whistling buoy was "abeam bearing south southwest, in my opinion about "*a mile to a mile and a half* off, I changed the course "for the heads, which is *about* northeast by east." (p. 60). Capt. Metcalfe says: "He [the pilot] steered "the ship in for the whistling buoy, which we picked "up and passed it on the north side, *probably about a* "*half a mile off*" (p. 99).

Tillotson says:

"Q. Where did you pick up the pilot?"

"A. Close to the whistling buoy. *I heard it, but* "*did not see it*" (p. 252).

Bridgett says:

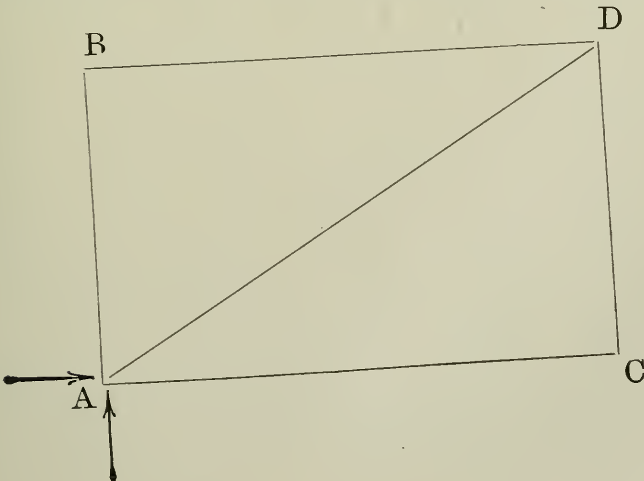
"We heard the whistling buoy, and the pilot then "shaped our course toward the North Heads. * * "The captain and pilot gave orders to look out for the "nine-fathom buoy, and requested the pilot to keep to "the north side of mid-channel. *We did not see the* "*nine fathom buoy at all*" (p. 273).

The fact that the collision occurred nearer to the south than the north shore is further shown by the fact

which appears undisputed, that the tide caught the *Chester* and carried her to the northward, and that this tide current, when the tide was like it was at the time of the collision, sets strongly from the south shore northerly to near mid-channel, or a little short of it, and then turns into the harbor. We call attention to the testimony of Captain Westdahl (pp. 209–18), Pilot Myer (pp. 94, 95), and Captain Metcalfe (p. 119). The *Chester* was under the influence of this tide current, and she would not have been if the collision had occurred within a quarter of a mile of the north shore.

The point where the wreck now lies also demonstrates that the collision occurred nearer to the south than to the north shore—that without regard to which point, that given by Westdahl, or by Whitelaw—is accepted as correct. For there were several forces which operated to finally deposit the wreck of the *Chester* at a point much to the northward (and, of course, to the eastward as well), of the place of collision. According to Captain Metcalfe the *Oceanic* was not coming straight in, but had her helm hard a-starboard, and was continuously turning toward the north shore (p. 108). Her direction, before changing her helm to hard a-starboard, had been NE., $\frac{1}{2}$ E. And he says the *Chester* headed to the north and had headway at the time of the collision (pp. 107, 156, 157). As the *Chester* was, at the time of the collision, going nearly straight across the channel, and the *Oceanic* was coming in with her helm hard a-starboard, and the point of collision was at the bow of the *Oceanic*, and near the

bow and on the port side of the *Chester*, the effect of the northerly direction of the *Chester* (which was helped strongly by the tide), would be to turn the *Oceanic* further toward the north. Whether or not the *Oceanic* had, at that time, any headway, she was, according to the evidence of defendant, given some headway immediately after the collision. (See testimony of Mirk, p. 291, and of Brolly, p. 294.) Taking the resultant of all these forces—the *Oceanic* heading NE. ½ E. (p. 66), with helm hard a-starboard, the *Chester* nearly at right angels, or (p. 107) nearly NW. ½ N., and the vessels striking their bows together and with the tide helping to carry them northward, and with some headway given the *Oceanic* before the *Chester* went down—the resultant of all these forces, we confidently claim, would be well illustrated by a line drawn from the point of collision to the resting place of the wreck, and the commencing point of this line, showing the point of collision, would be away to the southwest of the wreck, or but a short distance off from the Fort Point buoy. We illustrate by a "Parallelogram of the Forces."



Let the point "A" represent the place of collision. Let the line "A B" represent the direction, and the length of the line the intensity of the two forces—the tide rip and the momentum of the *Chester*. Let the line "A C" represent the direction and length of the line the momentum of the *Oceanic*.

The resultant of these combined forces is not "A "B" nor "A C," but the new line "A D," along which the two vessels would be carried during the six minutes which elapsed from the collision to the sinking of the *Chester*, and the point "D" is where the wreck will be found, which point will be quite a distance to the northward as well as eastward from the point "A," the point of collision.

Our contention that the collision occurred well in toward the south shore is further conclusively sustained by the testimony of the *Oceanic's* officers. When the first signal was given the *Oceanic* had already passed Point Diablo, and was a half mile away from the *Chester* (pp. 97, 116, 279, 154, 162). The *Oceanic* would, with her helm hard a starboard, turn completely around on a radius of one half a mile (pp. 134, 163). Now, if the *Oceanic*, with her helm hard a starboard, will turn entirely around in one mile of water, she will in one-half mile turn so as to be at right angles to her former position, and be substantially one-half mile in advance and one-half mile to the left of her former position. If then the *Oceanic* was but a quarter of a mile from the north shore, and was a half mile distant from the *Chester* when the first signal was

given, and immediately turned her helm hard a starboard, and kept it there until after the collision, the point of collision would have been up on the land of Marin county, about one-quarter of a mile north of Black Point. Or, if the helm of the *Oceanic* had been turned hard a starboard, as stated, she would in the run made have turned so much as to have been heading at the time of the collision in a direction fully at right angles to her previous course. It is plain that the *Oceanic's* helm was not placed and kept hard a starboard, or that she was all the time much further to the southward than contended for by the defense, or that the vessels were much nearer to each other than one-half mile when the first signal was given. It is, in fact, probable that all three of these matters were true.

As to the distance apart of the two vessels at the first signal, Capt. Metcalfe and his officers give it at one-half mile. This is naturally the extreme of their judgment. In fact, it was much less than that distance, and the vessels were in dangerous proximity to each other before any signal was given, as we will proceed to show from the testimony. The distances at the time of the first signal were from 600 to 800 yards, according to Officer Tillotson (p. 255). About two minutes' time elapsed between the first and the second signals (pp. 69, 118). The second signal was sounded, and almost immediately afterward the order was given to reverse the engines of the *Oceanic*. The engines had not been reversed two minutes when the collision occurred (pp. 289, 291, 293, 294). And the *Chester* was likewise, and for the same length of time, going

full speed astern (pp. 312, 197). The *Chester* before that had been at a speed of from five to six knots (p. 226). The pilot says the *Oceanic* was going at about three to four knots (p. 69). The combined speed at which the vessels were approaching each other then, at the time they gave the orders "full speed astern," was about ten miles per hour. This speed was surely reduced one half, or to five miles per hour, or one mile every twelve minutes, by the reversing of the engines, yet they collided in less than two minutes from the time of the second signal—showing either that the *Oceanic* was maintaining a much higher rate of speed than her officers are willing to admit, or that *the vessels were less than one sixth of a mile distant from each other at the time of the second signal.* In other words, the vessels were brought in such dangerous proximity before this signal was sounded that perfect accuracy of action on the part of the officers and machinery of both vessels was absolutely requisite to avoid a collision. To thus unnecessarily place two vessels in such proximity that only perfection of machinery and management on the part of both will avert disaster is highly culpable on the part of all engaged therein who have such control as to be able to order otherwise. This is especially true when it is remembered that they had and knew that they had a fog, a strong flood tide and a strong cross-current to contend with.

It is significant, also, that the *Oceanic* did not reverse even when in the dangerous proximity at the time of

the second signal, but awaited a little time longer—how long is uncertain—before any measures were taken to avert the disaster. The testimony is—as we will hereafter point out—that long before the order to reverse was given, the *Oceanic* had been brought into such close proximity to the *Chester* that the collision was a certainty.

We submit that the testimony, if it does not disclose the *Oceanic* to be alone culpable, does in any event show that vessel to have been equally at fault with the *Chester.* The equipments of both appear to have been reasonably and equally sufficient. Each had equal opportunities with the other to know the harbor and tide. Their opportunities to locate each other by hearing the fog signals were equal. The *Oceanic,* being in the fog bank, was, however, able to sight the *Chester* before the *Chester* could see the *Oceanic* (p. 192), and in this respect was in the better position.

The right of appellees to a decree for damages does not depend upon showing the management of the *Chester* to have been free from blame. If it be held that the vessels were meeting "end on," then they both violated Art. 15 of the Revised Rules and Regulations for Preventing Collisions at Sea (U. S. Stats. 48th Cong. p. 441), and also Sec. 2360, Political Code, and Rule 1, Sec. 970, Civil Code of California.

"Art. 15: If two ships under steam are meeting "end on, or nearly end on, so as to involve risk of collis-"ion, *each shall alter her course to starboard,* so that each "may pass on the port side of the other. * * *."

Sec. 2360, California Political Code, reads: "When "steamers meet, *each must turn to the right,* so as to "pass without interference." It will be noticed that this statute applies to all cases of steamers meeting, whether they meet "end on" or "on crossing courses."

Rule 1, Sec. 970, California Civil Code, reads: "Whenever any ship, whether a steamer or sailing ship, "proceeding in one direction, meets another ship "whether a steamer or sailing ship, proceeding in "another direction, so that if both ships were to con- "tinue their respective courses they would pass so near "as to involve the risk of a collision, *the helms of both* "*ships must be put to port,* so as to pass on the port side "of each other; and this rule applies to all steamers "and all sailing ships, whether on the port or starboard "tack, and whether close-hauled or not, except where "the circumstance of the case are such as to render a "departure from the rule necessary in order to avoid "immediate danger, and subject also to a due regard to "the dangers of navigation, and, as regards sailing "ships on the starboard tack close-hauled, to the keep- "ing such ships under command."

It is worthy of note that a departure from the above rule is only allowable *when necessary in order to avoid immediate danger*—not when it may be merely a convenience.

In view of the definition of the term "end on," contained in the latter part of Article 15 of the Revised Rules, we are not prepared to contend that these vessels were meeting "end on," in the statutory defimtion

of that term, and only mention it here to show that under such assumption appellees would be entitled to recover, for the violation of a statute raises the presumption of negligence. (*Taylor* vs. *Harwood*, 1 Taney 444). And this rule is an exceedingly stringent one. (The Senff. 32 Fed. Rep. 237, Sec. 972 Cal. Civil Code). This presumption we will invoke in favor of appellees in another view of the case. The evidence discloses that the officers of the *Oceanic*, when that steamer was off Point Bonita, heard the fog signals of the *Chester* about two or three points on their starboard bow (p. p. 67–254). The *Oceanic* was in the fog (p. 109). As the *Chester* approached there was no apparent change in her direction (p. 67). And when from three to five minutes later (p. 68) the *Chester* loomed up out of the fog she was from two and one-half to three points on the starboard bow, and from a quarter to a half a mile away (pp. 68, 77, 93, 101, 113, 255, 258, 279, 296). Two or three minutes elapsed and the signal was again sounded (p. 69). And at the time of the sounding of the second signal of two blasts her angular direction was practically unchanged (p. 280). The *Chester* was then so headed that her masts and funnel appeared in line from the bridge of the *Oceanic*. The situation was such that Article 16 of the Revised Regulations was applicable: "If two ships under steam are crossing "so as to involve risk of collision, the ship which has "the other on her starboard side shall keep out of the "way of the other."

And Rule 5, Section 970, Cal. Civil Code: "When

"steamers must inevitably or necessarily cross so near "that by continuing their respective courses there "would be risk of collision, each vessel must put her "helm to port, so as always to pass on the larboard "side of each other."

Both of the above statutes apply to the facts of this case, and, whether they can be reconciled with each other in all cases which might arise, they are strictly in harmony with each other under the existing facts here. The *Oceanic* had the *Chester* on her starboard side, and the *Chester* had, therefore the right of way, and it was the statutory duty of the *Oceanic* to keep out of the way of the *Chester.* And the steamers were crossing so near that by continuing their respective courses there would be risk of collision, and it was, therefore the statutory duty (of both) to put their helms to port and pass each other "port to port." They elected, however, to violate these statutory rules and to attempt to pass "starboard to starboard" and a collision resulted. And it was the *Oceanic* that first elected to depart from the statutory rule of passing "port to port," and hence took the risk of passing in safety and assumed all liability for failure so to do. And it makes no difference that the *Chester* assented to the proposal of the *Oceanic* and did what she could to co-operate. A case of like facts with this one on this point is that of *The Titan,* 49 Fed. Rep. 479. Whether or not, in a controversy between the two vessels as to which would be liable to the other, the assent of the *Chester* to the proposal of the *Oceanic* might be of im-

portance, it certainly cannot be so in this case, for their mutual arrangement to violate the rules will not excuse either ship from liability for the resulting death. It is a rule, constantly applied, that if the navigation of one vessel contrary to the statute produces embarrassment in the navigation of another, the violation of the statute will be held to be a contributing fault. (*The Clara,* 49 Fed. Rep. 768.)

It is urged by appellant that if the *Chester* had promptly taken the direction the *Oceanic* supposed she would take after the first interchange of signals, there would have been no collision. This may be true; but it appears absolutely certain that if both had obeyed the statute by placing their helms hard a-port instead of hard a-starboard, there would have been no collision. As it was, the keeping of their helms hard a-starboard, coupled with the effects of the tide, brought the vessels together. The evidence discloses that both vessels were aware of the condition of the tide, and they knew that at that time it sets so strongly across the channel from the south as to carry a vessel whose bow is caught in it, strongly to the north; and that in planning to pass each other they made no allowances whatever for the effects of this tide. This, in itself, was unseamanlike. A vessel proposing to pass another is in fault for not making allowances for the influences of the tide on the other. (*The Titan,* 49 Fed. Rep. 479.)

It was the duty of the *Oceanic* to keep away a sufficient distance to allow for any influence which the tide

might exert on the *Chester.* (*The Clara,* 49 Fed. Rep. 768; *The Fred Jansen,* 49 Fed. Rep. 256; *The Francis,* 44 Fed. Rep. 510.)

The evidence here discloses that both the captain (pp. 109, 119), and the pilot (pp. 94, 95), of the *Oceanic* knew of the condition of the tide, and of the fact that at that time a tide rip sets strongly from the south toward the north shore, or at least toward mid-channel, and that a vessel caught therein would probably be deflected from her course thereby (pp. 127, 129), yet, having such knowledge, no allowance whatever was made for the influence of this tide rip on the course of the *Chester*.

In fact, it would be inexcusable negligence for them not to know the state of the tide, and its tendency to carry a ship out of her course. (The *John H. May,* 52 Fed. Rep. 327). If the decisions on this point are followed, it must likewise be clear that where fully informed as to the tide, the vessel makes no allowance whatever for their well known influence, is still more culpable. Besides, it is the duty of vessels to keep out of the way of each other by a safe margin—having reference to all contingencies of navigation, and to unexpected contingencies, and even slight errors. (*The Aurania,* 29 Fed. Rep. 124–5. *The Ogemaw,* 32 Fed. Rep. 922). In the case of the *Aurania* the facts were not as strongly against her as they are against the *Oceanic,* for in that case the *Aurania* had the right of way, while in this case, as already pointed out, it was the statutory duty of the *Oceanic* to keep out of

the way of the *Chester,* the latter having the right of way.

The management of the *Oceanic* was grossly culpable from another point of view. She heard the fog signals of the *Chester* some three to five minutes before the latter hove in sight. These signals were from two and one-half to three points on the starboard bow. When the *Chester* hove in sight her angular direction was substantially the same, though the distance apart of the two vessels must have been lessened more than one-half. And at the time of the second signal the angular direction of the *Chester* from the *Oceanic* remained as before. All this ought to have warned the *Oceanic* that the *Chester* was on such a course that the highest degree of caution would be necessary in order to avoid disaster. Thus, where the whistle of the "S," as first heard from the "N," bore a point on the starboard bow, and was placed by the master of the "N" at a half mile away, and *there was no widening of the bearing of the "S's" subsequent whistles,* it was held that the "N" was at fault in failing to promptly stop and reverse. (*The North Star*, 62 Fed. Rep. 71).

A further and conclusive answer to the contention that if the *Chester* had taken the direction the *Oceanic* supposed she would take from her signal there would have been no collision, is that one steamer is not justified in relying upon the promise of another, in the face of her conduct to the contrary. (*The Gallileo,* 28 Fed. Rep. 473; *The Minnie C. Taylor,* 52 Fed. Rep. 323; *The Beryl,* L. R. 9 Prob. Div. 137;

The Dordogne, L. R. 10 Prob. Div. 6; *The Stanmore,* L. R. 10 Prob; Div. 135). The principles invoked in the cases last cited, when applied to the facts developed by the evidence in this action, fully establish that the *Oceanic* was guilty of negligence, and of a violation of Articles 16 and 18 of the Revised Rules and Regulations, and likewise Rule 3 promulgated by the Supervising Inspectors. Article 16 has been already quoted. Article 18 reads: "Every steamship, when "approaching another ship so as to involve risk of col- "lision, shall slacken her speed, *or stop and reverse if* "*necessary.*" Rule 3 of the Supervising Inspectors is found at page 81 of the Reporter's Transcript.

In discussing Article 16, the Court in *The Beryl* says: "If the circumstances of those two ships which "are under steam are such that the persons in charge "of them ought to see that risk of collision is in "volved, the ship which is on the starboard side is "bound to do something to keep out of the way of the "other. Another rule of interpretation of these Reg- "ulations is (the object of them being to avoid *risk* of "collision) that they are all applicable at a time when "the risk of collision can be avoided—not that they "are applicable when the risk of collision *is already fixed* "*and determined.* We have always said that the right "moment of time to be considered is that which exists "*at the moment before the risk of collision* is constituted. "The words are not 'if two ships under steam are "crossing with a risk of collision,' but 'are crossing so "as to *involve risk of collision,*' that is the *moment be-*

"*fore* there was a risk of collision." Did those in charge of the *Oceanic*—having the *Chester* on her starboard side, and hence obligated to keep out of the way—do anything to keep out of the way as soon as they saw, or ought to have seen, that risk of collision was involved? On the contrary at that time they contented themselves with watching the *Chester*, and signalling to her to do something, themselves in the meantime going recklessly forward to disaster. And when they finally did act, it was after the risk of collision had become an absolute certainty, and when the only result their action could have would be to mitigate to some degree the dire results which had become a certainty. We assert, without fear of successful contradiction, that the evidence discloses that the *Oceanic* did not act as promptly as she should have done, and that the uncertainty in the course of the *Chester*, and the risk of collision involved thereby was apparent and fully recognized from the *Oceanic* long before any action was taken to avoid the risk. We quote some of the testimony on this point, and desire the Court to remember that it came from witnesses desiring to exculpate themselves, and hence to sustain the course pursued by the *Oceanic*. Pilot Myer, at page 63, says:

"I said 'Now is the time to give him two distinct "whistles to tell him we will starboard; he is now on "our starboard bow; he is going this way; so that he "may put his wheel to starboard and clear us.' He "answered directly with two distinct whistles. At the "time we saw the loom of him in the fog coming to-

"ward us—*pointing toward our midships*—and the hull "came out plainer and plainer. He *seemed to be moving a little bit to starboard.* It was only for a moment "or two. She seemed to be under the influence of her "port helm. I sang out 'Give him two more whistles.' These two whistles were blown and he "answered them again, but instead of the ship answering the helm as it seemed—I don't know whether "there was something in the way—he came as under "a port helm, coming this way, *right toward us.* I said "to Captain Metcalfe 'There will be a collision as sure "as can be. I don't see how he can miss us. Put "your engines full speed astern.' We were going then "at the rate of not more than from three to four knots. "We put the engines full speed astern."

Again at page 64 :

"After the first whistle, when she hove in sight, *we did not see that she moved under her starboard helm as she ought to,* and we gave her another two blasts of the "whistles, and she answered again with two blasts of "the whistle. *Then he did not move to starboard, as he ought to have done.* As sôon as I saw she moved this "way we went full speed astern."

Again on page 71 :

"Q. How long was it from the time you sounded "the second whistle until you gave the order to reverse?"

"A. It was the same time; no time elapsed; when "I gave the second whistle; about half a minute; I "said immediately."

Again on page 72:

"Q. Why did you sound that second signal?"

"A. To make sure that he would starboard a little "more."

"Q. Then *when she did signal you that she would star-"board, did you wait at all to see whether she would or not?*"

"A. *I could see that she did not;* then I reversed "right away."

Again, on page 74:

"Q. At the time that you sounded the second sig-"nal to the *City of Chester*, and got her reply, did it "look to you as if there was any risk of a collision?"

"A. *After she had sounded I knew she could not clear "us.*"

"Q. You knew she could?"

"A. *She could not; she could not clear us,* because "she was under, as it appeared, port helm instead of "starboard."

"Q. I want to ask you once more, why did you "sound that second signal to the *City of Chester?*"

"A. Because his first signal was answered, but not "obeyed."

"Q. After the first signal *was answered, but not "obeyed, and you saw the Chester, there was such uncer-"tainty in her movements that you did not know what she "was going to do,* is that so?"

"A. *That is what it was.*"

"Q. So that you sounded the second signal in order "to verify the first one?"

"A. *That is correct.*"

On page 89:

"Q. *Do you mean to tell us that there was but one thing "that would have saved the ship from colliding with you "after you first saw her, and that was that she should obey "her starboard helm?"*

"A. *Certainly."*

"Q. *That was the only thing that would prevent a col- "lision from the time you first saw her?"*

"A. *Yes, sir."*

"Q Then from the time you first caught sight of "the *Chester* you felt that there would be a collision "unless she went to port?"

"A. Yes, sir."

"Q. Unless she obeyed her starboard helm?"

"A. Yes, sir."

"Q. Is that right?"

"A. Yes, sir."

"Q. If that was the condition of affairs, why did "you sound that second signal?"

"A. Because she did not go that way."

On page 91:

"Q. *After you had watched her long enough to see that "she was not obeying the signal, you went full speed astern,* "is that right?"

"A. *That is right;* that is what I said a little while "ago."

On page 93:

"Q. As I understand, you say when you saw the "*City of Chester* a half a mile away, and some three "points on your starboard bow, that nothing could

"avert the collision or disaster except her turning to
" starboard ?"

"A. That is what it is."

In other words, the pilot discloses that the *Oceanic* placed herself in such a position that from the time of first sighting the *Chester* she was dependent entirely upon the latter vessel to avert disaster. Yet for two minutes more she came recklessly onward at a good rate of speed, and then contented herself with repeating the signal to starboard, waiting a little longer to see whether the *Chester* would do so, and then—when the collision was inevitable—attempted to take some measures to avert it.

We quote some of the evidence of Captain Metcalfe on the same question. On page 101:

"Looking carefully on the starboard bow, which was
"the place we heard the signal of the out-coming
"steamer, I saw a dark mass of a hull looming up
"through the fog, about two and one-half points on
"the starboard bow, 2½ or 3 points. I said to the pilot
"at that time. 'there is that craft.' He said, 'blow
"two blasts.' The second officer at the wheel blew
"two whistles, and our helm was put hard a-starboard
"at the same time. The ship, not having much way on
"her, turned gradually and slowly to port. Soon after
"that, watching this ship carefully, he answered these
"two signals given him. Two blasts of the whistle mean-
"ing 'pass me on the starboard side,' to which we re-
"ceived an answer. If the ship had acted on that
"starboard helm, there is no reason why she should

" have passed any nearer than a quarter of a mile of
" us. Watching him carefully, we saw there was little
" or no indication of him acting on the starboard helm,
" and the whistles were repeated and were answered
" again. *Immediately after, seeing that there was no indi-*
" *cation of the ship acting on the starboard helm,* I said to
" the pilot: 'What the devil is that fellow doing?' I
" had my hand on the telegraph at the time; I rang
" the telegraph 'Full speed astern' as hard as I could,
" at the same moment I sung out 'full speed astern,'
" and then I was watching the two ships carefully, be-
" cause we went full speed astern before we struck the
" *City of Chester.*"

On page 102:

" At the moment the two ships came together the
" *Chester* had considerable way on her. *We saw no in-*
" *dication of her answering her starboard helm,* or *obeying*
" *the signals* mutually agreed upon between us. About
" the time of the second signal, or very soon after, we
" could see the ship swinging rapidly, as if under a
" strong port helm, and the *Chester* having considerable
" way on her, came across the *Oceanic's* bow; for some
" little time it looked as if the *Chester* might run into
" the *Oceanic.* *I simply waited developments* in order to
" give the necessary orders if she struck the *Oceanic,*
" or got across our bow."

On page 110:

" Q. Why did you sound that second signal to 'star-
" board' to the *Chester?*"

" A. Because we saw he was not acting according
" to his answer to the first."

" Q. What was it given for ?"

" A. To verify the first."

" Q. After having received his second signal, did
" you wait at all to see whether or not he was obeying
" it ?"

" A. No, sir; because about that time we could see
" him swing rapidly, as if acting on a port helm. I
" said to the pilot, 'what the devil is he doing ?' and
" swung the telegraph 'full speed astern.' "

" Q. Did not the pilot, in answer to your question,
" say immediately, ' He has answered our signal; if he
" obeys it it is all right ?"

" A. That was the first signal. He said, ' he has
" answered our signals; that is all right.' It would
" have been if the ship had acted in accordance with
" it."

" Q. *After the first signal there was something that in-*
" *dicated to you that he was not starboarding before you gave*
" *the second ?*"

" A. *Certainly*."

" Q. Then you gave the second ?"

" A. Then we gave the second."

On page 112 :

" Q. You heard his signal agreeing with you to go
" to starboard, and at the same time your sight indi-
" cated that he was going to port, did it not ?"

" A. *After the first signal he did nothing. The ship*
" *seemed to come straight ahead, therefore we repeated the*
" *signal.*"

On page 113:

"Q. How soon after the first signal from the *Ches-*
"*ter* did you get sight of her?"

"A. *I myself had sight of her when the first signal*
"*was given.*"

"Q. What direction did she appear to be taking at
"the time."

"A. *I know she was coming end on to us,* $2\frac{1}{2}$ *or* 3
"*points on our starboard bow.* * * * *The sight indi-*
"*cated that he would run into us if he did not carry out the*
"*signal we gave him, which he answered.*"

On page 118:

"Q. How much time elapsed, as nearly as you can
"tell, between your first and second signals to the
"*Chester* to starboard the helm?"

"A. *Probably two minutes,* as near as my memory
"will serve now."

"Q. I will ask you whether there was any way
"that you could have avoided the collision if the
"steamer *Chester* had kept what was her apparent
"course at the time that you first saw her?"

"A. If she had maintained the course she was
"steering when we first saw her, the chances are that
"if we had gone full speed ahead we might have
"crossed her bow."

On page 128:

"Q. Did you make any allowance in your arrange-
"ments for passing the *Chester* for the sheer that this
"tide would give her?"

"A. I most certainly did not." * * *

"Q. You relied upon the *Chester* entirely on that "question?"

"A. I relied upon the seamanship of the captain "of the *City of Chester* carrying out the whistle signal "that we had each given and answered."

On page 131:

"Q. Did you give the matter of the *Chester* being "caught in the tide any consideration whatever?"

"A. *I do not think I did. I left that for the captain* "*of the Chester.*"

On page 144:

"Q. Between the time you discovered that she "was not doing what she had agreed to do, and your "sending your ship full speed astern, how much time "elapsed?"

"A. Not more than half a moment, [minute?] "less."

"Q. Was it any more than was necessary to enable "yourself and Pilot Myer to locate and recognize the "fact that she was not doing what she had agreed to "do?"

"A. *Just sufficient time in our judgment to see that* "*the ship was doing exactly opposite to what she had agreed* "*to do. The only course then was to go full speed astern.*"

On page 155:

"Q. As I understood you all through, the direc- "tion [*i. e.*, of the *C.* from the *O.*] did not change "substantially up to the time of the second signal—

"that is, so far as the number of points were con-
"cerned?"

"A. Not a great deal, no sir?"

"Q. *The position was such at the time of the second "signal as if the Chester had simply advanced along the "line toward the Oceanic.*

"A. *Yes, sir.*

We also quote from the testimony given by First Officer Tillotson:

On page 256:

"Q. When was any change made in her [*Oceanic's*] "movement with reference to going astern?"

"A. *After the second two blasts were given, and did "not appear to be responded to by the approaching steamer.*'

"Q. The blasts were responded to, were they not?"

"A. *But the course of the ship did not correspond with "the signal given.*"

On page 258:

"Q. At the time you first saw the *Chester* what "appeared to be her position toward the *Oceanic?*"

"A. She was coming at an angle of about 2½ to 3 "points on the starboard bow."

"Q. What direction was the *Chester* taking, or "could you tell?"

"A. She was taking the direction to come in 2½ "points from ahead of the *Oceanic.*"

"Q. Was she coming toward the *Oceanic?*"

"A. *She was standing over towards the Oceanic, cross-"ing ships.*"

On page 259:

"Q. *At the second time that your attention was called "to the Chester had her position changed any—her direction "from the Oceanic?"*

"A. *Apparently not.*"

"Q. Were the vessels nearer together?"

"A. *Considerably nearer.*"

"Q. *But her apparent direction from the Oceanic was "substantially what it was at the first signal?"*

"A. *I should imagine so.*"

On page 260:

"Q. Between the first and second signals did it "appear to you that the distance between the *Oceanic* "and the *Chester* had broadened?"

"A. Between the first and second signals?"

"Q. Yes."

"A. Had broadened?"

"Q. Yes.

"A. No sir."

On page 262:

"Q. Was there long enough time elapsed from the "time of the sounding of the second signal up to the "time of the engines going full speed astern to notice "whether or not the *Chester* was obeying that second "signal?"

"A. *There was ample time to notice whether she was "obeying it.* I understood you asked me, was there "time for me to see that she had answered?"

"Q. *Time for you to observe that she did not obey her "helm?"*

"A. *Yes, sir.*"

"Q. I do not know that you understand the ques-
"tion. I want to know *whether between the time that the*
"*second signal was sounded and answered, and the time*
"*that the Oceanic's engines went full speed astern, was there*
"*time to see whether the Chester obeyed that signal and went*
"*to starboard?*"

"A. *Yes, sir.*"

"Q. Then when it was seen that she did not obey
"the signal and go to starboard, the engines of the
"*Oceanic* went full speed astern?"

"A. Yes, sir."

We quote from the testimony of Second Officer Bridgett:

On pages 274 and 275:

"We passed Point Diablo. Just after doing so we
"heard the whistle of a steamer, which appeared to
"be coming out. Everybody's eyes were attracted in
"that direction. Just after hearing her whistle two
"or three times the ship appeared. The pilot gave
"the order to blow two blasts and the helm to be put
"hard a starboard. * * * The Captain said to
"the pilot: 'That is all right; she has answered our
"whistle.' *Still watching her, the Captain said: 'She*
"*does not seem to answer her rudder,'* and the pilot said,
"'No, blow two whistles again,' which was done. She
"answered both whistles each time. The Captain
"then said: 'Full speed astern,' and he worked the
"telegraph himself."

"Q. How long a time elapsed between the blow-

"ing of the last two whistles and the order to go full "speed astern?"

"A. Almost immediately. *The vessel came along, "acting as though she was under the influence of her port "helm; she came right along,* and struck the *Oceanic* "right in the bow."

On page 276:

"Q. At what distance from the *Oceanic* was the "*Chester* when you first saw her?"

"A. A half a mile."

On page 279:

"Q. How many points off your starboard bow was "the *Chester* when you first saw her?"

"A. Two and one-half to three points."

"Q. And about a half mile distant?"

"A. Yes, sir."

On page 280:

"Q. *What direction did she appear to be heading at the "time the first signal was sounded?*"

"A. *Right for the bridge of the Oceanic; may have "been a little bit abaft of the bridge.*"

"Q. *What direction did she appear to be heading at "the time of the second signal?*"

"A. *The same direction.*"

"Q. Appeared to be heading toward the bridge of "the *Oceanic?*"

"A. Yes, sir."

"Q. How much nearer was she; *what distance were "the ships apart at the time the second signal was sounded?*"

" A. *About a quarter of a mile; may be less.*"

" Q. That is, *between the first and second signals the " ships have covered about half the distance that was between " them;* is that right?

" A. *Yes, sir.*

The testimony which we have thus quoted is from those witnesses upon whom the defendant relies to be cleared from liability. This testimony is that the *Oceanic* knew with reasonable certainty, by reason of the fog signals, the position of the *Chester* before the first signal of two blasts was given. She knew that the direction did not broaden on nearer approach, and that therefore the *Chester*, instead of going to port, was continuously turning to starboard, so that she constantly pointed toward the bridge of the *Oceanic*. Their sense of hearing disclosed to the officers of the *Oceanic*, before the *Chester* appeared out of the fog, that the latter ship was crossing the *Oceanic*. And later their sense of sight disclosed that the *Chester* was running them down.

It would necessarily be conceded that if from the time they first heard the *Chester* until it was absolutely too late to avoid a collision, the pilot and captain of the *Oceanic*, although obeying the signal agreed upon, had resolutely shut their eyes to the movements of the *Chester*, their conduct would have been the most glaring negligence. They did worse than the supposed case, however, for they kept their eyes open and watched the course of the *Chester*, and deliberately allowed her to approach so near and take such position

that collision was inevitable, before they took any measures to avert it. They all substantially agree that at the time of the second signal they had approached so near to the *Chester* as to be unable themselves to take effective action. They came on, trusting not to their own judgment, skill and seamanship to avert disaster, but having blind and misplaced confidence in the promise of the other vessel, in the face of her conduct directly the contrary of her promise, a conduct plainly and continuously before their view from the time of and even before the first signal. They were bound to see, and they did see that the *Chester*, instead of obeying the signal, and turning to the left, was moving in an opposite direction, or, at least, was heading directly, and, as they say, with considerable speed toward their ship. They saw that notwithstanding the promise of the *Chester* to pass "starboard to starboard," she was doing nothing of the kind, or at least was so tardy in her movements that the situation was growing critical. Were they justified in thus relying upon the promise of the *Chester*, in the face of her conduct to the contrary? "The "language of the Twenty-first [now Article 18] Rule "is imperative and plain. It applies from the moment "when the approach of vessels is such as to involve risk "of collision between them. In *The Beryl*, 9 Prob. "Div. 137, the Court, in considering the English stat-"ute, which is in language identical with ours, says "that 'the right moment of time to be considered is "that which exists at the moment before the risk is "constituted.' The rule does not permit the calcula-

"tion of chances and the weighing of probabilities, "because risk intervenes the moment this becomes "necessary; and it certainly cannot be material whether "the risk depends upon the contumacy of the other "vessel, or her supineness in fulfilling her obliga- "tions, or the probability that she will perform her "duty, or upon circumstances quite independent of "such chances." (*The Galileo*, 38 Fed. Rep. 473.)

We commend to the consideration of the Court the case of the *Khedive*, L. R. 5 Ap., cases 876, and particularly the evidence given in detail at pages 885 and 886. The case in its facts appears very much like the one before this Court. The vessels were approaching "green to green," and were at first on parallel courses, the *Voorwaarts* about 3 points off the starboard bow of the *Khedive*. Then, at the distance of about three-quarters of a mile, the *Voorwaarts* suddenly ported. The *Khedive* immediately went hard a-starboard, and about a minute later went full speed astern. The engines were going full speed astern a minute and a half before the collision occurred, and were going astern at the time of the collision. The decision—and it is from the House of Lords—holds the *Voorwaarts* to have been groosly at fault, but that the *Khedive* was also liable, for the reason that she did not stop and reverse until the risk of collision had become a certainty of collision. That having violated a statutory rule the burden of proof was on the *Khedive* to show that her failure to sooner stop and reverse did not contribute to the disaster, the presumption being that it did so con-

tribute. The case before this Court is stronger against appellant in its facts, for here the vessels were at no time on parallel courses, but the *Chester* came directly toward the *Oceanic* (at first gradually swinging to starboard, so as to point continuously toward the bridge of the *Oceanic*), until after the second signal, when being caught in the tide, she seemed to be acting on her port instead of her starboard helm. The burden of proof was on the defense to show that the failure of the *Oceanic* to reverse more promptly did not contribute to the disaster. The defense has contented itself, however, by claiming that the disaster could have been averted by different conduct of the part of the *Chester*, and avoided opportunity to show the probable effect of an earlier reversal of the engines of the *Oceanic*, though such opportunity was afforded. (See the answers of Capt. Metcalfe, pages 118 and 119 of the record). Yet the rule is well established that errors, committed by one of two vessels approaching each other from opposite directions, do not excuse the other from adopting every proper precaution required by the circumstances to prevent collision. (*The Louise*, 52 Fed. Rep. 888.) And if there is any uncertainty as to the intentions of the approaching vessel, this of itself calls for the closest watch and the highest degree of diligence on the part of the other with reference to her movements, and it behooves those in charge to be prompt in availing themselves of every resource to avoid, not only the collision, but the *risk of such a catastrophe*. (*The Manitoba*, 122 U. S. 108.) The case

of *The Manitoba* was one where the positions of the vessels were as they were in our case—approaching each other "green to green," and on slightly converging lines, which was apparent to the officers of both vessels for considerable time before the *Comet* ported her wheel. On these facts the Supreme Court held that the *Manitoba*, in addition to being in fault for not signaling, and in not slowing up, was also in fault in failing to reverse her engine until it was too late to accomplish anything thereby.

Were the circumstances in this case such as to invoke the rule that would require the *Oceanic* to stop and reverse before she actually did so? The fact was observed by the Captain of the *Oceanic* that notwithstanding their mutual advance and his own change of helm, the *Chester* still continued to approach his starboard bow with unaltered bearing, indicating that the two vessels were approaching each other on intersecting lines, and that unless there was a change in the bearing of the *Chester* the vessels would, as a matter of mathematical certainty, meet at the point of intersection. Under these circumstances, his continuing to advance when he knew, or ought to have known, that in spite of his own starboard helm the *Chester* was coming nearer, without any appreciable change of bearing, was a violation of the second part of Article 18, for it was necessary to stop and reverse in order to avoid not collision, but *risk of collision*. In broad daylight it is necessary for two approaching steamers to stop and reverse whenever it becomes apparent to the

eye that if they continue to approach they will in all likelihood either shave close or collide. (See *The Ceto*, L. R. 14 App. Cas. 688 and 686; *The Bristol*, 11 Fed. Rep. 156). The testimony of the officers of the *Oceanic* is that that steamer positively had no way on her at the time of the collision. If, therefore, they had reversed at an earlier point of time—at the time when they were blindly rushing into danger, relying solely upon the promise of the *Chester*, in the face of her conduct directly to the contrary of her promise—it is a moral certainty that there would have been no collision.

"The rules of navigation were ordained to prevent "collisions, and to preserve life and property embarked "in a perilous pursuit, and not to enable those whose "duty it is to adopt, if possible, the necessary precau-"tions to avoid such a disaster to determine how little "they can do in that direction without becoming re-"sponsible for its consequences in case it occurs." (*The America*, 92 U. S. 432.) The maritime law is rigid in exacting unremitting vigilance and care on the part of those entrusted with the navigation of vessels to avoid accidents by collision. Any negligence, inattention, or want of skill will result in responsibility. (*Ward* vs. *Ogdensburg*, 5 McLean, 622).

We desire to revert again to the contention of the *Oceanic* that she had a right to ignore the tide rip as a factor, and to rely upon the promise of the *Chester* to not be influenced in her course by such tide rip. We have already quoted authorities showing it to have

been the duty of the *Oceanic* to have made proper allowances for the influence of that tide rip on the course of the *Chester.* We now call attention to the fact that the *Oceanic* had no right to rely upon the promise of the *Chester* to overcome, without swing, the influences of the tide rip, for the reason that the *Chester* made no such promise. She did not promise to cut through that tide rip on a straight line, nor to be uninfluenced thereby. All that she did promise by her signals was to turn to the left as best she could under influence of all the factors and contingencies to be dealt with. Her reply to the signals of the *Oceanic* meant: "I will put my helm hard a-starboard as you "request, but we must both make proper allowances "for the contingencies of navigation and the influence "of our surroundings. Keep far enough to the north "so that the tide rip, which we both know about, will "not throw me against you." The *Oceanic* was negligent in not making such allowances.

Suppose the fact to have been that instead of there being a tide rip, which would carry the *Chester* to the right, there had been a promontory extending into the channel, or a rock, which she would necessarily have to avoid, the argument of appellants would be that the *Oceanic* could presume that the *Chester* would run over the obstruction, instead of going around it. It is claimed by appellant that Supervising Inspectors' Rule 3 has no application to this case, because the two steamers had no misunderstanding of each other's signals. The rule is, however, on the condition that if

the pilot of either vessel fails to understand *the course* or *intention* of the other, whether from signals given or answered erroneously, *or from other causes.* It is plain from the evidence that the course of the *Chester*, as apparent to the sense of sight, was not at any time in harmony with her intention, as indicated to the sense of hearing, by her answer to the signals.

Nothing could be better calculated to cause the pilot to fail to understand the course and intention, than to have his sense of sight tell him one thing with positiveness, and his sense of hearing, with like positiveness, assert directly the contrary. If the course of the *Chester* was to starboard, instead of to port, then the signal was answered erroneously, and the pilot could not understand her course or intention from such erroneous signal. It will be noticed, too, that Rule 3 comes in force when there is a failure to understand the course or intention of the other vessel from *any other cause* as well as from erroneous signals. It was held in *The Britannia*, 34 Fed. Rep. 555, that Supervising Inspectors' Rule 3 applied in a case where a signal had been agreed to to go astern, but there was uncertainty from the action of the vessel whether she would after all do so, or go ahead, or collide, and the pilot contented himself with repeating his original signal.

The rate of speed maintained by the *Oceanic* was a gross violation of Article 13, of Act of March 3, 1885, which is that, "Every ship, whether a sailing ship or "a steamship, shall, in a fog, mist, or falling snow, go at a moderate speed." We call attention to the decis-

ion on this point, made by the District Court, and found at pages 345 to 348, inclusive, of the record: The finding is—and it is fully sustained by the evidence—that the *Oceanic* was maintaining a speed of more than $10\frac{3}{4}$ knots per hour (p. 346). Of this from 2 to 3 knots was from the effect of the tide (p. 345), so that the *Oceanic*, instead of coming in "dead slow," was making actual progress through the water of 8 knots per hour. Five miles per hour in a fog is not a moderate speed. (*The Martello*, 34 Fed. Rep. 71). Seven knots in a dense fog, in a much frequented highway of commerce, is not a moderate speed, although the vessel nearly stopped before striking the other vessel. (*Leonard* vs. *Whitwell*, 10 Benedict, 638). A steamer moving against the tide in a fog, in a narrow channel, at the rate of five and one-third miles per hour, held liable for the collision. (*The Luray*, 24 Fed. Rep. 751). Four or five knots an hour is not a moderate speed for a steamer in a fog. (*The Magna Charter*, 25 Law Times (London) N. S. 512). It is faulty navigation for a vessel to continue her course at a rate of speed of over five miles per hour in a dense fog, and where other vessels are liable to be encountered. (*The Raleigh*, 31 Fed. Rep. 527). A steamer proceeding in a fog, and hearing a fog horn on her bow, indicating the approach of another vessel in a course crossing her own, is bound immediately to stop until, by repeated blasts of the horn, she can assure herself of the exact bearing course and distance of the approaching vessel. (*The Martello* vs. *The Willey*, 14 Sup. Ct. Rep. 723, 1894).

We contend that it is established by the evidence :

1. That the *Oceanic* came in on a line south of mid-channel.

2. That she came at an immoderate rate of speed.

3. That the ships in electing to pass "starboard to "starboard" violated Section 970 of the Civil Code.

4. That they violated Section 2360 of the Political Code.

5. That, the *Chester* having the right of way, the *Oceanic* violated Article 16 of the "Revised International Rules for Preventing Collisions at Sea," act of March 9, 1885.

6. That the *Oceanic* violated Article 21 of the Revised Rules.

7. The *Oceanic* violated Article 18, which provides : "Every steamship, when approaching another ship so "as to involve risk of collision, shall slacken her speed, "or stop and reverse, if necessary."

8. The *Oceanic* violated Rule 3 of the Rules adopted by the Treasury Department of the United States Government for the steerage of vessels. This Rule reads : "If, when steamers are approaching each "other the pilot of either vessel fails to understand "the *course or intention* of the other, whether from sig-"nals being given or answered erroneously, *or from* "*other causes*, the pilot so in doubt shall immediately "signify the same by giving several short and rapid "blasts of the steam whistle ; and if the vessels shall "have approached within a half a mile of each other "both shall immediately be slowed to a speed barely

"sufficient for steerage way until the proper signals "are given, answered and understood, or until the "vessels shall have passed each other."

It is not a part of our case to prove the *Chester* to have been free from blame. We submit, however, that the evidence does not disclose so much fault in her as can be imputed to the *Oceanic*. Her appointments, gearing, steering apparatus and machinery were in every respect sufficient. She had her full complement of competent officers and crew. She went out slowly, feeling her way through the fog. She sounded fog signals as required by the rules. She took the course usually taken by outwardbound craft. The *Oceanic* asked her to violate the statutory rule of passing "port to port," and she assented. She suddenly sees the *Oceanic* loom up in front of her and on the *south side of the channel,* and she then promptly reverses, goes full speed astern, and does all in her power to avert the disaster. Her conduct appears less blameworthy than that of the *Oceanic,* for the latter, desiring to come in on the north, is found on the south side of the channel, and the latter is the vessel which first proposes a violation of the statutory rules for the passing of vessels. The *Chester* promptly reverses as soon as she catches sight of the *Oceanic,* while the *Oceanic* watches the *Chester* for upward of two minutes after sighting her, and does not reverse until the "risk of "collision" is no longer a *risk,* but is a foregone conclusion. The doctrine of comparative negligence has, however, no application to the case. The management

of the *Chester* may have been criminally negligent, while the *Oceanic* was guilty of a comparatively venial fault, yet the *Oceanic* would be liable. (*The Arratoon Apcar,* L. R. 15. App. cases 37). Thus delay in signaling, and in reversing, are proper grounds for holding a vessel liable, though the management of the other vessel was grossly improper. (*The A. Crossman,* 58 Fed. Rep. 808). Nor can it be claimed that any contributory negligence on the part of the *Chester* can be imputed to a passenger thereon. (*Little* vs. *Hackett,* 116 U. S. 366; *The Bernina,* L. R. 12 Prob. Div. 58).

In scrutinizing the actions of appellant with reference to this deplorable accident, we submit that it is the duty of the Court, in the consideration of this case, to keep in view the stringent obligations which have been placed upon navigators, in order to avoid collisions at sea, " which the Courts will never relax." (*The Seuff*, 32 Fed. Rep. 237).

The rule applicable, and by which the conduct of appellant is to be judged, is one of the most stringent that is applied to the affairs of men. A vessel will be held liable unless the closest watch, the highest degree of diligence, the most prompt measures, and the use of every resource at command has been availed of, not only to avoid collisions, *but even risk of collision.* (*The Manitoba,* 122 U. S. 108).

The maritime law is rigid in exacting unremitting vigilance and care on the part of navigators to avoid accidents by collision. Any negligence, or inattention,

is sufficient upon which to base the liability. (*Ward* vs. *Ogdensburg*, 5 McLain C. C. 622).

Slight error or omission is sufficient to make the defendant liable, though the other vessel be grossly or even criminally negligent. (*The Arratoon Apcar*, L. R. Ap. Cas. 37).

We again call attention to the above rule, and to the authorities sustaining it, for the reason that this case is controlled thereby, and because counsel for appellant have in their brief persistently insisted upon the Court taking a much more liberal view of the obligations imposed upon their client. We invoke the rule because it is strictly applicable to the facts of the case—because the captain of the *Oceanic*, standing on the bridge of that vessel, saw the *Chester* when she was a half-mile distant, saw that she was headed directly toward the *Oceanic*, saw that as the distance between the vessels was shortened, the *Chester* continuously turned toward the *Oceanic*, so as to constantly head toward her bridge, and in the face of this conduct on the part of the *Chester*, the captain of the *Oceanic* chose to rely on a promise that he saw was not being kept, and remained supine and inactive until he saw a collision was inevitable. According to his own evidence, the measures which he finally did adopt were not taken to avoid *risk of collision*, or even to avert the collision, but merely to mitigate to some degree the consequences of that which, through his failure to seasonably adopt proper measures to prevent it, had became a certainty. "I simply "waited developments, in order to give the necessary

"orders if she struck the *Oceanic* or got across our "bows" (p. 103).

For convenience of the Court we list here some of the authorities upon which we rely:

The Phœnix, 58 Fed. Rep. 927.
The John H. May, 52 Fed. Rep. 883.
The Locklibo, 3 Rob. Ad. 318.
Union SS. Co. vs. *N. Y. SS. Co.*, 24 How. U. S. 313.
Taylor vs. *Harwood,* 1 Taney, 444.
The Senff, 32 Fed. Rep. 237.
The Clara, 49 Fed. Rep. 768.
The Titan, 49 Fed. Rep. 479.
The Aurania, 29 Fed. Rep. 124.
The Ogemaw, 32 Fed. Rep. 922.
The Galileo, 28 Fed. Rep. 473.
The Minnie C. Taylor, 52 Fed. Rep. 323.
The Beryl, L. R. 9 Prob. Div. 137.
The Dordogne, L. R. 10 Prob. Div. 6.
The Stanmore, L. R. 10 Prob. Div. 135.
The Khedive. L. R. 5 App. Cases 876.
The Manitoba, 122 U. S. 108.
The Ceto, L. R. 14 App. Cases 688.
The Bristol, 11 Fed. Rep. 156.
The America, 92 U. S. 432.
Ward vs. *Ogdensburg,* 5 McLean, 622.
The Britannia, 34 Fed. Rep. 555.
The Arratoon Apcar, L. R. 15 App. Cases 37.
Little vs. *Hackett,* 116 U. S. 366.

The Bernina, L. R. 12 Prob. Div. 58.
Sherlock vs. *Alling*, 93 U. S. 99.
The Louise, 52 Fed. Rep. 885.
The Virginia, 49 Fed. Rep. 84.
The Francis, 44 Fed. Rep. 510.
The Fred Jensen, 49 Fed. Rep. 254.
The Intrepid, 48 Fed. Rep. 323.
The Atlas, 93 U. S. 302.
The John S. Darcy, 29 Fed. Rep. 644.
The Breakwater, 39 Fed. Rep. 511.
The A. Crossman, 58 Fed. Rep. 808.
The Martello vs. *The Willey*, 14 Sup. Ct. Rep. 723, 1894.
The Magna Charta, 25 Law Times (London) N. S. 512.
The Raleigh, 31 Fed. Rep. 527.
The Luray, 24 Fed. Rep. 751.
The Martello, 34 Fed. Rep. 71.
Leonard vs. *Whitwell*, 10 Com. C. C. 638.
The North Star, 62 Fed. Rep. 71.

The case of *The Khedive*, L. R. 5 Ap. cas. 876, is more nearly on all fours with the present case than any other cited by either side. An examination of the cases cited by appellant will disclose that they are not in conflict with what we contend for. In order to determine what is adjudged in any case the case should be viewed as an entirety—not judged of by some general expression contained in the opinion.

We confidently submit that upon the facts and law of these cases the decrees of the District Court should be affirmed.

CLINTON L. WHITE AND
WILLIAM H. COBB,
Proctors for Appellees.

October, 1894.

Nos. 191 and 192.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

NINTH CIRCUIT.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY, a Corporation, *Appellant,* vs. HENRY F. SMITH et al., *Appellees.*	}	No. 191.
OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY, a Corporation, *Appellant,* vs. ELIZA A. SMITH, *Appellee.*	}	No. 192.

PETITION FOR REHEARING.

FILED
MAR 7 - 1896

W. H. L. BARNES,
Proctor for Appellant,
Crocker Building.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY,

Appellant,

vs.

HENRY F. SMITH ET AL.,

Appellees.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY,

Appellant,

vs.

ELIZA A. SMITH,

Appellee.

I respectfully ask for a rehearing in these cases upon the following grounds:

In concluding its opinion affirming the decrees of the District Court in these cases the court of appeals

says: "This case affords an opportunity which should
" not be lost, for emphasizing another important rule for
" preventing collisions, which must be observed by
" navigators; this is found in Art. 21 of the Inter-
" national Rules above referred to, and Art. 25 of the
" Act of August 19, 1890 (1 Supp. R. S. Sec. Ed., 781–
" 788), which reads as follows: 'In narrow channels
" 'every steam vessel shall, when it is safe and prac-
" 'ticable, keep to that side of the fair-way or mid-
" 'channel which lies on the starboard side of such
" 'vessel.' 'The Statutes of California contain a
" 'similiar provision to which reference was made in
" 'the opinion of the District Judge. This rule was vio-
" 'lated by the "Oceanic" in entering the Golden Gate
" 'on the occasion of the disaster involved in those
" 'suits, AND THE ONLY EXCUSE offered for taking the
" 'north side, is that it is customary for large vessels
" 'in entering to take the north side. We cannot find
" 'in the testimony or argument of counsel any attempt
" 'to give a reason for the alleged custom, and, if it be
" 'true that there is such a custom, it is bad in principle
" 'and contrary to law, and the courts will not recog-
" 'nize it as affording any ground for exempting a
" 'vessel from liabilities incurred by disregarding the
" 'law. ("The Victory," 68 Fed. Rep., 395; "The
" 'Brittannia," 153 U. S., 130).'"

If the Court will refer to the transcript of record at page 100, it will find the following extracted from the testimony of Capt. John Metcalfe, master of the "Oceanic:"

" Q. You say, as I understand, the same as Capt. " Meyer does, that you were about a quarter of a mile " off from Point Diablo?

" A. As near as I could estimate—a quarter of a " mile.

" Q. As you remember, your direction was about " north northeast?

" A. No, sir; about northeast half east.

" Q. Northeast half east?

" A. Yes, sir. Up to this first cross [pointing] it " had been northeast by east. In order to carry out " my wishes, the pilot put her half a point more to the " northward, *in order to hug the north shore, which is* " *the only safe shore to enter the harbor of San Fran-* " *cisco in foggy weather.*

" Q. How far were you from the north shore when " the collision occurred?

" A. About a quarter of a mile.

" Q. At the time, or before the collision, did you see " Fort Point at all?

" A. I told the pilot I was watching to see if I could " see Fort Point, but we were so far off Fort Point that " I could not see it. *I never heard any fog signal on* " *Fort Point.* I was watching for that. I told him I " thought I could see the loom of the Fort; I was not " certain, but I could see Lime Point—the white fog " signal landing on it plainly.

" *The Court*—Q. You say you could not hear the " fog signal at Fort Point?

" A. *No, sir; you can never hear it unless you are* " *right on top of it, or to leeward of it.*

" *The Court*—Q. What is the good of it?

" A. *None. When you are inside, you can occasion-*
" *ally hear it, because you are to leeward of it, and the*
" *sound is carried to you.*"

Again on page 92: " We then proceeded on slowly,
" steering for the north head, which is Point Bonita,
" and I told the pilot I wished him to keep to the north
" shore, simply *because that is the safest shore where*
" *the Government had placed all the fog signals on that*
" *shore, being free from danger, as a guide to the navi-*
" *gation of the port;* the pilot said he would do so.
" We passed Bonita Point about half a mile off."

Capt. Wallace of the "City of Chester" describes his course up to the time of going into the fog as hugging the south shore (see transcript of record, page 176).

" It was clear weather until we got down to Pre-
" sidio shoal buoy, and it was still clear in shore to the
" southward of us, but thick outside of us; but we were
" running on the edge of the fog, and we started the
" fog whistle blowing, that is, we blowed once a minute,
" and we run into the fog before we got down about
" halfway between the Presidio shoal buoy and the Fort
" we ran into the fog.

" *By the Court*—Q. Was the Presidio shoal buoy
" to your right or left?

" A. About 150 feet to the right.

" *By Mr. White*—Q. Then you were inside of it?

" A. Yes, sir.

" Q. Inside the shoal?

" A. Yes, sir. *We steered the usual course going* " *down to clear the Fort*, and down a little ways, off " Presidio, down a little ways, we ran into the fog quite " thick."

Applying to such evidence the rule that "in narrow " channels every steam vessel shall, when it is safe and " practicable, keep to that side of the fair-way or mid- " channel which lies on the starboard side of such ves- " sel," would require the "Oceanic" to come into port hugging Fort Point and keeping up the bay on the south side. The same rule would have required the " City of Chester," instead of going between the Presidio shoal buoy and the south shore and hugging Fort Point as she endeavored to do, to cross the bay in the direction of Lime Point and keep out on the northerly side of the Golden Gate hugging Point Diablo and Point Bonita. But neither vessel took such a course as would be required by the rule. The reason given for the departure from it by both, and each independent of the other, was *not*, as stated by the Court, the bald excuse of a custom, but it was because the mariner well knew that in coming from sea in heavy weather, where the view of objects on shore would be impossible, or more or less indistinct, he could get no aid from the signal fog bell at Fort Point until he was, to use Capt. Metcalfe's expressive language, " right on top of it or to leeward of it," and the shore on that side was shallow and rocky with numerous danger signals in the way of spar and other buoys, while approaching Point Bonita and the north shore there was a steam whistle or siren which could be heard for some distance at sea, and

another siren at Lime Point and deep water all the way. The same reason made the captain of the "City of Chester" attempt to go out by way of the south shore, because being inside and to the leeward of Fort Point he could hear its fog bell and guide his steamship by it. Therefore, compliance with the rule referred to, which, under ordinary circumstances, required the vessel to keep to that side of the fair-way or mid-channel, which lies on the starboard side of such vessel, was unsafe and impracticable; while to go to the other side was safe and practicable.

I think the Court might find in such testimony as I have quoted above, taken from the transcript of record in these cases, not merely an attempt to give a reason, but a reason which in itself is good and substantial. If, then, this seems, upon a re-examination of the record, to be the case, and the testimony there exists as I have quoted it and it is uncontradicted by any witness, it ought to be sufficient for a finding that under the circumstances the "Oceanic" was not at fault in taking the north side of the bay upon entering this port, and is not, for that cause alone, to be held liable.

I respectfully ask is it just to a litigant before this Court that its decision should find and declare that no attempt to give a reason for the alleged custom was made by the record or by counsel, when, in point of fact, it really appeared that a reason was given, and a full explanation furnished of the course pursued by both vessels, and which reason had led to a universal custom or practice of vessels entering and going out of this port in foggy weather. I claim that the appellant

is entitled to have this testimony considered, and that it is sufficient, when considered, to relieve the "Oceanic" from the charge of negligence and inexcusable violation of law so far as her course was concerned.

Again the Court say: "If the Court should find "as a fact that the course of the 'Oceanic,' in enter-"ing and her position at the time of coming in sight "of the 'City of Chester,' were as claimed by the "appellant, such finding would not exculpate the "'Oceanic,' *unless the position of the 'Chester' was* "*south of mid-channel*; for, if, at the time of giving "passing signals, both vessels were near mid-channel, "or if the positions and courses of the two vessels made "it necessary for them to pass each other in the nar-"rows, and on the same side of mid-channel, the law of "the road required each to turn to the right, so as to "pass each other port to port. And the 'Oceanic,' in "taking the initiative by signaling to pass on the star-"board hand, assumed the risk of all consequences. If "both vessels were north of mid-channel, in that com-"paratively narrow passage-way, they must have "appeared to each other at a distance of half a mile, to "have been approaching each other end on, or nearly "so. Each vessel was therefore required, by Art. 15 "of the Revised International Rules and Regulations "for Preventing Collisions at Sea, adopted by Act of "Congress of March 3, 1885 (23 U. S. Stat., 438–441), "to alter her course to starboard so as to pass on the "port side of the other. If, however, they were not "meeting end on or nearly so, then necessarily the "two vessels were on crossing courses and the

" 'Oceanic' had the 'Chester' on her starboard side, " and it was made her duty by Art. 16 to keep out of " the way of the other vessel, and failure to do so, in " view of the claim made on her behalf that she was " officered, manned and equipped in the most perfect " and complete manner, and under perfect command, " was inexcusable."

I submit that the testimony of the officers of the "Chester" shows, so far as the "City of Chester" was concerned, that she was as far to the south of mid-channel at the time she was perceived from the "Oceanic" as she could get. Between Lime Point and Fort Point ~~Bonita~~ the Golden Gate is seven-eighths (⅞) of a mile wide, therefore mid-channel may be said to be half a mile from either shore. The officers of the "Oceanic" swear she was a quarter of a mile from Lime Point, which placed her a quarter of a mile north of mid-channel. The "City of Chester" when first seen was half a mile distant, so she, therefore, was at least a quarter of a mile to the south of mid-channel. Under such conditions it was not only lawful, as I will later show, but good seamanship for the "Oceanic" to keep to the north and for the "City of Chester" to pursue her way to sea, in the position in which she was, south of mid-channel. At the time of giving the first signal neither vessel was in mid-channel or near it, and the law of the road did not require both vessels to pass each other port to port except it was safe and practicable to do so. Can it be said that it was the duty of the "Oceanic" to run into mid-channel and head toward the "City of Chester" for the purpose of passing port to port? Clearly the wise

course was that pursued by the " Oceanic." She was where, under all the evidence, it was safe for her to be; she was proceeding with the utmost caution, and her signal to pass starboard to starboard was one which was proper, under the conditions in which these vessels were. It was not a case of steamers approaching each other " head and head " or " end on," or nearly so, a condition which makes it the duty of each steamer to pass to the right of the other, under conditions in which the pilot of either steamer may be the first in determining to pursue this course, and may give as a signal of his intention one short and distinct blast of his steam whistle which the pilot of the other steamer shall answer promptly by a similar blast of his whistle, and thereupon the steamers shall pass to the port, or right side, of each other. It was a condition where the course of the steamers was so far to the starboard of each other as not to be considered by pilots as meeting " head and head," or nearly so.

The stem of the " Oceanic " was not pointing at any time toward the stem of the " City of Chester," but away from her. The " City of Chester " was, however, pointing toward amidships of the " Oceanic," and the pilot of the " Oceanic " had under such conditions the right to give two short and distinct blasts of his steam whistle, which the pilot of the other steamer answered promptly by two similar blasts of his steam whistle, and they would have passed to the left, or on the starboard side, of each other if the " City of Chester " had minded her helm. It was precisely such a case as is provided for in the Official Rules and Regula-

tions for the Government of Pilots, adopted under the laws of the United States by the Board of Supervising Inspectors June 18, 1871, and approved by the Secretary of the Treasury, and which have been in force ever since.

For the purpose of making my view clear, I have placed below diagrams taken from the Rules and Regulations for the Government of Pilots just referred to. Rule 1 is as follows:

"RULE 1. When steamers are approaching each "other 'head and head,' or nearly so, it shall be the "duty of each steamer to pass to the right, or port "side, of the other; and the pilot of either steamer may "be first in determining to pursue this course, and "thereupon shall give, as a signal of his intention, one "short and distinct blast of his steam whistle, which "the pilot of the other steamer shall answer promptly "by a similar blast of his steam whistle, and thereupon "such steamers shall pass to the right, or port side, of "each other. *But if the course of such steamers is so* "*far on the starboard of each other as not to be consid*-"*ered by pilots as meeting*, 'head and head,' or nearly "so, *the pilot so first deciding shall immediately give* "*two short and distinct blasts of his steam whistle*, "*which the pilot of the other steamer shall answer* "*promptly by two similar blasts of his steam whistle*, "*and they shall pass to the left, or on the starboard* "*side, of each other.*

"NOTE.—In the night, steamers will be considered "meeting 'head and head' so long as both the colored "lights of each are in view of the other."

The diagrams furnished by the Supervising Inspector-General and President of the Board Supervising Inspectors of the United States, approved February 28, 1882, by Chas. J. Folger, Secretary of the Treasury of the United States, perfectly illustrate my position and make the rule plain.

Every ocean-going steamer is required, when under way, to carry, "(A) At the foremast head, a bright "white light of such a character as to be visible on a "dark night, with a clear atmosphere, at a distance of "at least five miles, and so constructed as to show a "uniform and unbroken light over an arc of the "horizon of twenty points of the compass, and so fixed "as to throw the light ten points on each side of the "vessel, namely, from right ahead to two points abaft "the beam on either side.

"(B) On the starboard side, a green light, of such "a character as to be visible on a dark night, with a "clear atmosphere, at a distance of at least two miles, "and so constructed as to show a uniform and un-"broken light over an arc of the horizon of ten points "of the compass, and so fixed as to throw the light "from right ahead to two points abaft the beam on the "starboard side.

"(C) On the port side, a red light, of such a char-"acter as to be visible on a dark night, with a clear at-"mosphere, at a distance of at least two miles, and so "constructed as to show a uniform and unbroken light "over an arc of the horizon of ten points of the com-"pass, and so fixed as to throw the light from right "ahead to two points abaft the beam on the port side.

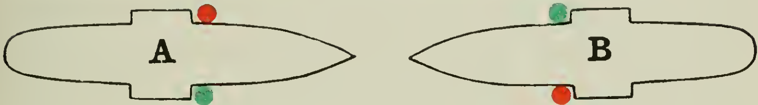
" The green and red lights shall be fitted with in-
" board screens, projecting at least three feet forward
" from the lights, so as to prevent them from being
" seen across the bow."

The diagram which illustrates Rule I, cited above, shows the first situation contemplated by the rule where two vessels are approaching head and head, or end on, or nearly so, toward each other. It will be noticed that in the diagrams the situation is such that the red light on the port side and the green light on the starboard side, as well as the white light, can be seen by both vessels (not by one) at the same time. In such a situation, it is a standing rule that both shall put their helms to port, each having previously given the one blast of the steam whistle.

The second situation is identical, nearly, with that of the vessels involved in these cases. The "City of Chester" was off the starboard bow of the "Oceanic" between two and three points, half a mile away, and while it might have been possible for one standing on the bridge or in the center of the "Oceanic" to see all the lights of the "City of Chester," it was a position in which the "City of Chester" could not have seen all the lights of the "Oceanic." She could have seen the green light on the starboard side of the "Oceanic," but not the red light on the port side. This, then, is the second situation comtemplated by Rule I. The green light, only, in such a case would have been visible to each from the stem or lookout of each, and the screen would have prevented the red light from being seen. They were, therefore, passing to star-

board, which under the regulations is ruleable in this situation; each pilot having previously signified his intention by two blasts of the steam whistle.

FIRST SITUATION.



Here the two colored lights visible to each will indicate their direct approach "head and head" toward each other. In this situation it is a standing rule that both shall put their helms to port and pass to the right, each having previously given one blast of the steam-whistle.

SECOND SITUATION.

Here the green light only will be visible to each, the screens preventing the red light from being seen. They are, therefore, passing to starboard, which is ruleable in this situation, each pilot having previously signified his intention by two blasts of the steam-whistle.

The steamers were not on the same side of mid-channel *when the first signals were given* to go to the left. It was the "City of Chester" which came over to the north side of the channel and not the "Oceanic," which went to the south; therefore the "Oceanic" assumed no risk of consequences. It was proper navigation, considering the position in which the ships were at the time when the "Oceanic" first

perceived the "City of Chester,"—the latter headed toward her and two points and a half or three points off her starboard bow. It was certainly not a case of "end on, or nearly so." If it can be called a case of crossing courses because the "Chester" was headed in such a way as to strike the "Oceanic" amidships, then the "Oceanic" was certainly right in keeping away from the "City of Chester" by sending her wheel still further to starboard and going as far to the shore on the left as her master and pilot deemed safe and practicable. I claim that there was no law of navigation which was violated by the "Oceanic." The Court, however, says that if the ships were in the position in which I claim they were, it was the duty of the "Oceanic" to keep clear of the "Chester," and her failure to do so in view of the claim made on her behalf, that she was officered, manned and equipped in the most perfect and complete manner and under perfect command, was inexcusable. How can this be justly said? That an honest effort of the "Oceanic" to keep clear of the "City of Chester" was made, is amply apparent. When the "Chester" was first perceived, the "Oceanic's" helm was put to starboard, which carried her still further to the north and left, and she was then within a quarter of a mile of Lime Point, while the "City of Chester" was half a mile away, and the testimony is undisputed that, at the time the first two blasts were given and answered by the two blasts from the "City of Chester," there was not the slightest danger of collision between the two steamers if the "City of Chester" had minded her helm

and done as her captain agreed she would do. Nor was there, according to the testimony, the slightest danger of collision at the time of the second interchange of signals if the "City of Chester" had done as she had agreed to do. The trouble was she did not. There was at no time sent from the "City of Chester" a danger signal or any intimation that, from any cause, she was unable to do what she had agreed to do, and I submit that under all the authorities cited on both sides of this case, that when those signals were exchanged the captain of each vessel had the right to rely upon the other doing what was agreed should be done, and it abundantly appears from the testimony that the "Oceanic," when danger was apparent, did all that good seamanship could do with a good ship to avoid disaster.

The Court say: "The position in which the wit-
" nesses for the appellant place the 'Oceanic' hug-
" ging the north shore proves too much, for the
" collision could not have occurred without fault on the
" part of her officers, unless the 'City of Chester,'
" from a position southward a sufficient distance to
" justify passing under a starboard helm, changed her
" course and crossed the channel, she could not have
" swung sideways against the bow of the 'Oceanic,' as
" counsel for appellant would have us believe."

I submit that this is exactly what the evidence shows the "City of Chester" did. One of the passengers on the "City of Chester," Mr. Clitus Barbour, a well-known and intelligent lawyer of San Francisco, said in his testimony, transcript of record, page 233: "They
" were not cross-ways exactly * * * not a quar-

" ter angle exactly, but nearly. It appeared to me as
" if our boat was trying to run round the end of them
" and missed it, and struck."

This inartificial story of a landsman precisely corresponds with the testimony given by the officers of the "Oceanic." They say the "City of Chester" was coming at full speed or nearly so; that she acted as if she was on her port helm; that she slewed around across the bow of the "Oceanic," collided with her, and in from four to six minutes thereafter filled and sank to the bottom of the bay.

The position in which the wreck was found on the same day of the disaster by Capt. Whitelaw, referred to in his testimony and depicted on the map, contained in the opinion, reduced from the large map used on the argument of the cause, demonstrates that the collision occurred just where the officers of the "Oceanic" claimed it did occur,—within a quarter of a mile from Lime Point. Two years after the accident, Capt. Whitelaw relocated the "City of Chester," and she was then in the same place in which he had found her on the day of the accident, and Mr. Westdahl of the Coast Survey admitted that if the "City of Chester" lay where Capt. Whitelaw said she did the collision must have occurred where the officers of the "Oceanic" claimed it did.

This important factor in these cases appears to have received no notice at the hands of the Circuit Court of Appeals, and I respectfully submit that the cases cannot justly be disposed of without that testimony being fully considered. The state of affairs on board the "City of Chester" as shown by the witnesses ought to

throw some light upon what the officers of the "Oceanic" claimed to have been the course, speed and conduct of the "City of Chester."

According to the testimony of her own people, she left Broadway wharf in the neighborhood of nine o'clock; steamed down, *hugging the southerly side of the bay* until near the Presidio when she passed into a dense fog. She was a steamer of twelve hundred (1,200) tons register, with one hundred and twenty (120) tons of miscellaneous freight and a number of passengers on board. Her chief engineer was David Franklin Cookson. He testified that the ship left Broadway wharf somewhere about nine o'clock; that the ship was put on her course *and the engines run full speed ahead*, and he then left the engine-room to go to his own room to get coffee. He got it. He then went into the engine-room down on the working platform. After he had been there a short time, he received a bell *to go full speed astern.* During his absence from the engine-room, he left in charge one Rufus Comstock, his second assistant engineer (transcript of record, page 188). This man says the "City of Chester" left Broadway wharf about five minutes after nine and ran full speed until about fifteen minutes to ten, *then slowed to half speed, and a minute and a half later the bell was rung for full speed astern.* The captain of the "City of Chester" was alone on her bridge. The first mate was below stowing cargo! The second mate was also below until the vessels were fifty feet apart! It was clear upon the trial of the case, and it is perfectly evident upon an examination of the transcript of record, that

the "Chester" was without any attention on the part of any person concerned in her management, except the captain, who was alone on her bridge. Is it any wonder, then, that such a steamer, so lightly loaded, running at full, or even half, speed, through a fog, could get out of her course and run across the bay instead of proceeding out to sea as she should have done?

The Circuit Court of Appeals finds the story of such conduct hard to believe, and says it is "contrary to the evidence and wholly unreasonable." It finds that "there is no probability that the 'Chester' threw her-" self across the bow of the 'Oceanic,' unless she was" deflected from her course by the tide rip, and, accord-" ing to the testimony, the current would not have" sufficient force to have caused the misadventure so" far north of mid-channel." But I respectfully submit that *this is just what the testimony does prove*, and that there is in it no such inherent improbability as to deny to it all credibility, as has been done by the Circuit Court of Appeals in these cases.

The Circuit Court of Appeals says that appellant's theory of the collision is contrary to the evidence and wholly unreasonable. I respectfully submit that our theory is sustained by the evidence; and while it would seem unreasonable that any man in his senses would navigate the "City of Chester" as she was navigated, yet when we consider that she left her dock and ran down on the south side of the bay to the Presidio at full speed, and plunged into a thick fog and ran at half speed until about the moment of collision,

and all the while this was going on her chief engineer was drinking coffee below, the first mate was stowing cargo below, the second mate was also below until about the moment of the accident, what wonder can there be that Capt. Wallace lost his way and headed across stream? Yet, none of these circumstances, which all have a bearing upon the probability or improbability or the reasonableness or unreasonableness of appellant's theory of the accident, do not appear to have attracted the attention of the Court.

I respectfully submit that there is no reason why the statements made by the master, the pilot and the officers of the "Oceanic" should not be received with full credit instead of being discredited by the Court, without any evidence to the contrary of what these persons state.

It is an established rule that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats who judge or form opinions merely from observation.

"The Folsom," 52 Fed. Rep., 411.
"The Hope," 4 Fed. Rep., 89.
"The Wiman," 20 Fed. Rep., 248.
"The Alberta," 23 Fed. Rep., 807.

This sound and established rule of evidence was totally ignored by the District Court in its opinion, who found in effect, without any evidence to sustain it, that the master, pilot and officers of the "Oceanic" either did not know what they were saying or were

guilty of absolute perjury in swearing as to the course and speed and conduct of the "Oceanic," and proceeded, by a sort of inductive reasoning to give to both the "Oceanic" and the "City of Chester" a course and speed and conduct totally differing from the testimony on both sides of the case, and found upon its own reasoning, and not upon the facts as developed by the evidence, that the "Oceanic" came up in mid-channel instead of hugging the north shore as all those on board of her agreed in swearing that she did.

The captain of the "Chester" and the witnesses produced by him, and who testified concerning the "Chester," placed her in a totally different position from that found by the District Judge, and from that found by the Circuit Court of Appeals. Nowhere is there any evidence to be found, or any reasonable deduction therefrom, which places the "Oceanic" and the "City of Chester" in a position of vessels "head and head, or end on, or nearly so," and it seems to me that in the undoubted position of the vessels when the "Chester" was first perceived by the "Oceanic," the right of the "Oceanic" to pass to the left and the duty of the "City of Chester" to also go to the left was beyond question, under the rule for the government of such vessels above cited.

But, under any circumstances, there is nothing in the case to warrant the Court in reaching the conclusion that six or eight intelligent and unimpeached witnesses, in a position to know the facts, have testified falsely in stating the course, position and speed of the "Oceanic."

These cases were submitted after full oral argument in October, 1894. They were decided in February, 1896, and it might be that this delay had removed from the minds of the learned judges, who heard the argument, some of the facts then presented, to which reference is made above, and which it seems to me are essential to its full consideration.

The questions involved are of the deepest importance to the navigation of large and deep-draught steamers and vessels, and which go far beyond the mere amount of money involved. Nothing can be lost by a rehearing, and I respectfully urge the Court to award it.

W. H. L. BARNES,
Attorney for Appellant.

I hereby certify in accordance with Rule 29 of the Circuit Court of Appeals for the Ninth Circuit, that in my judgment the foregoing petition for a rehearing in the above-entitled cases is well founded, and that said petition for rehearing is not interposed for delay.

W. H. L. BARNES,
Attorney for Appellant.

No. 195.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

NANNIE S. McWHIRTER.

In Error to the United States Circuit Court for the Northern District of California.

VALLEAU & OLIVER, PRINTERS, 403 SANSOME ST., S. F.

FILED
OCT 23 1894

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In the Superior Court of the City and County of San Francisco, State of California.

NANNIE S. McWHIRTER, Plaintiff, vs. THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Defendant.	}

Complaint.

The complaint of the above-named plaintiff respectfully shows to the Court:

That at all the dates and times hereinafter mentioned the above-named defendant the Connecticut Mutual Life Insurance Company was a corporation organized and existing under the laws of the State of Connecticut for the purpose of making and issuing policies of insurance upon lives, and that at the dates aforesaid the said defendant was carrying on business in the State of California.

That heretofore, to-wit: on the 18th day of December, A. D. 1891, the above-named plaintiff and one Louis B. McWhirter, now deceased, were and up to the death of the said Louis B. McWhirter, on the 29th day of August, 1892, continued to be such husband and wife.

That heretofore, to-wit: on the 19th day of December, A. D. 1891, the above-named defendant, by its certain policy in writing, dated on that day in consideration of an annual premium of one hundred and eighty-six

and fifty one-hundredths ($186.50–100) dollars to be paid to said defendant on or before the 18th day of December, 1891, and on or before the same date in every year until twenty annual premiums should be paid, did insure the life of the said Louis B. McWhirter of Fresno, in the county of Fresno, in the sum of five thousand ($5,000) dollars, to be paid Nannie S. McWhirter, the plaintiff herein, the wife of the said Louis B. McWhirter, for her sole use and benefit, within thirty days after due and satisfactory evidence of the death of the said insured should have been received at the office of said Company defendant in Hartford, Connecticut, subject to the conditions and agreements upon the second page of said policy, which are as follows: "THIS POLICY is issued and accepted "upon the following expressed Conditions and Agree- "ments, referred to on the first page and made a part "of this Contract:

"1st. That this Contract of Insurance is wholly "expressed and contained in this poiicy and the appli- "cation therefor, and that no alteration, change, "modification, waiver or subsequent agreement what- "ever, respecting this policy shall be binding on said "Company unless made in writing signed by the execu- "tive officers thereof; and that agents of the Com- "pany have no power or authority to make, alter, "change, or modify any of the terms, conditions or "agreements of this policy, or to waive forfeitures "thereof.

"2nd. That this policy shall not be in force "and binding on this Company until the advance "premium hereon shall have been actually paid

" during the lifetime of the insured; and that if any
" subsequent premium or installment of premium, on
" this policy be not paid when due, then this policy
" shall cease and determine and become and be null
" and void, except as hereinbefore provided after the
" payment of the requisite number of actual premi-
" ums; and that no premium on this policy shall be
" considered as paid unless a receipt shall be given
" therefor; signed by the President or Secretary of the
" company, and such receipt is the sole evidence of
" the authority of any agent to receive any premium
" on account of this policy; and that all premiums or
" other payments on account of this policy are paya-
" ble at the office of the company in Hartford, Conn.,
" and not elsewhere; but for the convenience of the
" person paying the same, such receipt may be sent to
" any agent or corrrespondent of the company for col-
" lection, and payment to such agent or correspondent
" shall be held to have been made at said office of the
" company.

" 3rd. That the following risks are not assumed by
" this company under this contract: Death while re-
" siding or being or from any disease contracted while
" residing or being, outside the Temperate Zone, or
" while personally engaged or employed, or from any
" accident or injury received while engaged or em-
" ployed, in making any aeronautic voyage or
" excursion, or in blasting, mining or in subma-
" rine operations, or in the manufacture, hand-
" ling, use, custody or transportation of highly inflam-
" mable or explosive substances, or upon service on
" any ocean, sea, sound, inlet, river, lake or railroad,

" or in any military or naval service whatsoever, in
" time of war, whether voluntary or otherwise, or as a
" member of any paid fire department, without the
" consent of this company previously given in writing;
" or death in the violation of law, or in
" consequence thereof, or after conviction of felony,
" or by self-destruction except upon satisfactory proof
" that the insured was so far insane as to destroy his
" responsibility therefor, or in state of drunkenness,
" or from any accident or violence received while in
" that state, or from ony disease caused by stimulants
" or narcotics; and if delirium tremens, or any injury
" to or impairment of the health be caused by them,
" this policy shall thereupon and thereby be wholly
" forfeited and terminated.

" In each and every of the foregoing cases this
" policy shall become and be null and void; but the
" company will, upon surrender and satisfactory re-
" lease hereof within one year thereafter and not
" otherwise, return to the Assured the then net reserve
" upon this policy, computed upon the American
" Table of Mortality and three percentum compound
" interest less any balance of the year's premium when
" not all paid at the beginning of the year, and any
" other indebtedness to this Company on account of
" this policy.

" 4th. That in every case in which this policy shall
" cease and determine or shall become and be null
" and void, all premiums paid and moneys or credits
" held on account of the same shall be forfeited to this
" company, except as hereinbefore provided.

" 5th. That no assignment of this policy shall be
" valid; but the company shall have power at any

" time, but at its own discretion to accept a surrender
" and discharge of the same by the assured and the
" payee of the cash value at stipulated periods.

And the plaintiff further alleges that each and all of the several answers, warranties and agreements contained in the application for insurance which was and is the basis of, and a part of the said policy, were and are true in the letter and the spirit thereof and the said warranties and agreements have been performed and made good.

That all premiums due under the said Policy have been paid.

That the said Louis B. McWhirter did not die from any cause in the said policy named, but that he did die on the 29th of August, 1892, at the City of Fresno, County of Fresno and State of California, by being murdered and assassinated by certain persons to the plaintiff unknown. That no assignment of this policy has ever been made.

That due notice and satisfactory evidence of the death of the said Assured Louis B. McWhirter was delivered to and received by the said defendant at its office in Hartford, Connecticut prior to the first day of December, 1892.

That the said defendant although often requested, has not paid the said sum of Five Thousand ($5,000.00) Dollars nor any part thereof.

II.

And for another and further cause of action, the said plaintiff respectively complains and shows to the Court:

That at all the dates and times hereinafter mentioned, the above-named defendant the Connecticut Mutual Life Insurance Company, was a corporation organized and existing under the laws of the State of Connecticut for the purpose of making and issuing policies of insurance upon lives, and that at the dates aforesaid, the said defendant was carrying on business in the State of California.

That heretofore, to wit: On the 15th day of March, 1892, the above-named plaintiff and one Louis B. McWhirter were and up to the death of the said Louis B. McWhirter, on the 29th day of August, 1892, continued to be husband and wife.

That heretofore, to-wit: on the said 18th day of March, A. D. 1892, the above-named defendant by its certain policy in writing dated on that day, in consideration of an annual premium of two hundred and eighty-nine and fifty one-hundredths ($289.50–100) dollars to be paid to said defendant on or before the 15th day of March, 1892, and on or before the same date in every year during the continuance of said policy, did insure the life of the said Louis B. McWhirter of Fresno, in the county of Fresno, in the sum of ten thousand dollars to be paid to Nannie S. McWhirter, the plaintiff herein, the wife of the said Louis B. McWhirter for her sole use and benefit within thirty days after due and satisfactory evidence of the death of said insured should have been received at the office of said company defendant in Hartford, Connecticut, subject to the conditions and agreements upon the second page of said policy which are as follows:

" This policy is issued and accepted upon the fol-
" lowing express conditions and agreements, referred
" to on the first page and made a part of this con-
" tract:

" 1st. That this contract of insurance is wholly ex-
" pressed and contained in this policy, and the applica-
" tion therefor, and that no alteration, change, modifi-
" cation, waiver or subsequent agreement whatever
" respecting this policy shall be binding on said com-
" pany unless made in writing signed by the executive
" officer thereof; and that agents of the company have
" no power or authority to make, alter, change, or
" modify any of the terms, conditions or agreements
" of this policy, or to waive forfeitures thereof.

"2nd. That this policy shall not be in force and
" binding on this company until the advance pre-
" mium hereon shall have been actually paid during
" the lifetime of the insured; and that if any subse-
" quent premium or installment of premium, on this
" policy be not paid when due, then this policy shall
" cease and determine and become and be null and
" void, except as hereinbefore provided after the pay-
" ment of the requisite number of annual premiums;
" and that no premium on this policy shall be consid-
" ered as paid unless a receipt shall be given therefor;
" signed by the President or Secretary of the company,
" and such receipt is the sole evidence of the authority
" of any agent to receive any premium on account of
" this policy; and that all premiums or other pay-
" ments on account of this policy are payable at the
" office of the company in Hartford, Conn., and not
" elsewhere; but for the convenience of the person pay-

" ing the same, such receipt may be sent to any agent
" or correspondent of the company for collection, and
" payment to such agent or correspondent shall be
" held to have been made at said office of the com-
" pany.

" 3d. That the following risks are not assumed by
" this company under this contract: Death while re-
" siding or being, or from any disease contracted while
" residing or being, outside the Temperate Zone, or
" while personally engaged or employed, or from any
" accident or injury received while engaged or em-
" ployed, in making any aeronautic voyage or excur-
" sion, or in blasting, mining or submarine operations,
" or in the manufacture, handling, use, custody or
" transportation of highly inflammable or explosive
" substances, or upon service on any ocean, sea, sound,
" inlet, river, lake or railroad, or in any military or
" naval service whatsoever in times of war, whether
" voluntary or otherwise, or as a member of any paid
" fire department, without the consent of this com-
" pany previously given in writing or death in the
" violation of law, or in consequence thereof, or after
" conviction of felony, or by self-destruction except
" upon satisfactory proof that the insured was so far
" insane as to destroy his responsibility therefor, or in
" a state of drunkenness, or from an accident or vio-
" lence received while in that state, or from any dis-
" ease caused by stimulants or narcotics; and if deli-
" rium tremens, or any injury to or impairment of the
" health be caused by them, this policy shall there-
" upon and thereby be wholly forfeited and termin-
" ated.

" In each and every of the foregoing cases this
" policy shall become and be null and void; but the
" company will, upon surrender and satisfactory re-
" lease hereof within one year thereafter and not
" otherwise, return to the Assured the then net re-
" serve upon this policy, computed upon the Ameri-
" can Table of Mortality and three percentum com-
" pound interest less any balance of the year's prem-
" ium when not all paid at the beginning of the year,
" and any other indebtedness to this company on ac-
" count of this policy.

" 4th. That in every case in which this policy shall
" cease and determine or shall become and be null and
" void, all premiums paid and moneys or credits held
" on account of the same shall be forfeited to this
" company, except as hereinbefore provided.

" 5th. That no assignment of this policy shall be
" valid; but the company shall have power at any
" time, but at its own discretion to accept a surrender
" and discharge of the same by the assured and the
" payee of the cash value at stipulated periods."

And the plaintiff further alleges that each and all of the several answers, warranties and agreements contained in the application of insurance which was and is the basis of, and a part of the said policy, were and are true in the letter and the spirit thereof and the said warranties and agreements have been performed and made good.

That all premiums due under the said policy have been paid.

That the said Louis B. McWhirter did not die from any cause in the said policy named, but that he did

die on the 29th day of August, 1892, at the city of Fresno, County of Fresno and State of California, by being murdered and assassinated by certain persons to the plaintiff unknown. That no assignment of this policy has ever been made.

That due notice and satisfactory evidence of the death of the said assured Louis B. McWhirter was delivered to and received by the said defendant at its office in Hartford, Connecticut, prior to the 1st day of December, 1892.

That the said defendant although often requested has not paid the said sum of ten thousand ($10,000) dollars nor any part thereof.

WHEREFORE plaintiff prays judgment against said defendant for the sum of fifteen thousand ($15,000) dollars and the costs of this action.

THORNTON & MERZBACH,
THOMPSON & KING,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

Crittenden Thornton, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled action; that the said plaintiff is not at present within the State of California, but is within the State of Tennessee; that this affiant is better acquainted with all the facts in this action than the said plaintiff; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the

matters which are therein stated on information and belief, and that as to those matters, he believes it to be true. CRITTENDEN THORNTON.

Subscribed and sworn to before me, this 7th day of January, A. D. 1893. W. J. HENEY,
Deputy County Clerk.

[Endorsed]: No. 39,438. Superior Court, City and County of San Francisco, Department No. —. Nannie S. McWhirter, plaintiff, vs. The Connecticut Mutual Life Insurance Company, defendant. Complaint. Filed January 7, 1893. M. C. Haley, Clerk, by W. J. Heney, Deputy Clerk. Thornton & Merzbach, Attorneys for plaintiff.

In the Superior Court of the City and County of San Francisco, State of California.

NANNIE S. McWHIRTER,
Plaintiff,
vs.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.

Petition for Removal.

To the Honorable Superior Court of the City and County of San Francisco, State of California:

Your petitioner respectfully shows to this Honorable Court, that it is the only defendant in the above-entitled action and that the time has not elapsed wherein petitioner is required by the laws of the State of

California or by the rules of said Court to answer or plead to plaintiff's complaint in said cause.

That the Summons issued out of this Court in the above-entitled action was served on the agent of defendant in the City and County of San Francisco, State of California, on the 9th day of January, 1893. That the amount in dispute in the above-entitled suit, exceeds, exclusive of costs, the sum of ten thousand dollars.

That the controversy in the said suit is between citizens of different States; and that petitioner was at the time of the commencement of this suit, and ever since has been and still is a corporation, duly organized and existing under and by virtue of the laws of the State of Connecticut, and having its office and principal place of business in the City of Hartford, State of Connecticut; and that your petitioner was, before and at the time of the commencement of this suit, ever since has been and still is a citizen of the State of Connecticut; and that Nannie S. McWhirter, the plaintiff herein, was before and at the time of the commencement of this suit, ever since has been and still is a citizen of the State of California.

That there is, therefore, a controversy in this action, between plaintiff who was before and at the time of the commencement of this action, ever since has been and still is a citizen of the State of California, and said defendant who was before and at the time of the commencement of this action, ever since has been and now is a citizen of the State of Connecticut and a non-resident of the State of California.

That said action is brought to recover a judgment of this Court by said plaintiff against your petitioner for the sum of Fifteen thousand dollars, alleged to be due upon the certain policies of insurance, upon the life of Louis B. McWhirter, deceased; the one in the sum of Five thousand dollars and the other in the sum of Ten thousand dollars.

And your petitioner offers herewith a bond, with good and sufficient surety for its entering in the Circuit Court of The United States, 9th Circuit, in and for the Northern District of California, on the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this Honorable Court to proceed no further herein, except to accept this petition and the said surety and bond, and to cause the record herein, to be removed into said Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, and it will ever pray.

JAS. H. BUDD.
REDDY, CAMPBELL & METSON,
Attorneys for Petitioner.

Connecticut Mutual Life Insurance Company.
James L. Fogg,
General Agent.

State of California,
City and County of San Francisco, } ss.

I, W. H. Metson, being duly sworn, do say, that I am a member of the firm of Reddy, Campbell & Metson, the attorneys for the petitioner in the above-enti-

tled cause; that I have read the foregoing petition, and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

Subscribed by the said W. H. Metson, and by him sworn to before me, this 17th day of January, 1893.

W. H. METSON.

(Seal) THOS. E. HAVEN,
Notary Public in and for the City and County of San Francisco, California.

In the Superior Court of the City and County of San Francisco, State of California.

NANNIE S. MCWHIRTER,
Plaintiff.
vs.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.

Bond for Removal.

KNOW ALL MEN BY THESE PRESENTS, That we, viz., said defendant, The Connecticut Mutual Life Insurance Company, a corporation under the laws of the State of Connecticut, and Geo. D. Gray of Oakland, State of California, and A. K. P. Harmon, Jr. of Oakland, State of California, as sureties, are held and firmly bound unto the plaintiff in the penal sum of $500.00 for the payment whereof, well and truly to be made to the said plaintiff, Nannie McWhirter, her heirs, representatives and assigns, we bind ourselves, our

heirs, representatives and assigns, jointly and severally by these presents, upon condition nevertheless, that whereas the said defendant, the Connecticut Mutual Life Insurance Company, a corporation, has petitioned the Superior Court of, in and for the City and County of San Francisco, State of California, for the removal of a certain cause, therein pending, wherein said Nannie S. McWhirter is plaintiff and the said Connecticut Mutual Life Insurance Company, a corporation, is defendant, to the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

Now if the petitioner aforesaid shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in the said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if the said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof, on this 17th day of January, 1893, the said Connecticut Mutual Life Insurance Company, caused its corporate name and seal to be affixed by James L. Fogg, General Agent, and the said sureties have hereunto set their hands and affixed their seals.

CONNECTICUT MUTUAL LIFE INS. CO..
By James L. Fogg, Gen'l Agent.
GEO. D. GRAY, (Seal.)
A. K. P. HARMON, JR. (Seal.)

STATE OF CALIFORNIA, } ss.
City and County of San Francisco. }

Geo. D. Gray and A. K. P. Harmon, Jr., being severally duly sworn, each for himself, deposes and says: That he is one of the sureties mentioned in the above undertaking, that he is a resident and freeholder in the said State of California, and is worth the sum in the said undertaking mentioned as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEO. D. GRAY.
A. K. P. HARMON, Jr.

Subscribed and sworn to before me, this 18th day of January, 1893.

(Seal). THOS. E. HAVEN,
Notary Public, in and for the City and County of San Francisco, State of California.

The foregoing bond is approved by me both as to form and sufficiency of sureties thereon, and amount thereof this 18th day of January, 1893.

WM. T. WALLACE,
Judge.

GEO. D. GRAY,
A. K. P. HARMON, Jr.

[Endorsed]: No. 39438. Dept. 6, Superior Court of the City and County of San Francisco, State of California. Nannie S. McWhirter, Plaintiff vs. The Connecticut Mutual Life Insurance Company, Defendant. Petition and Bond for removal of cause to U. S. Circ't Ct. and approval of bond by Judge. Filed January

18, 1893. M. C. Haley, Clerk, by Wm. T. Hawley, Deputy Clerk. Reddy, Campbell & Metson, Attorneys for Defendant.

State of California,
City and County of San Francisco, } ss.

I, M. C. Haley, County Clerk of the City and County of San Franciso, State of California, and ex-officio Clerk of the Superior Court thereof, hereby certify that the foregoing transcript is a full, true and correct copy of all the following named papers and pleadings and the endorsements thereon, now on file in my office in the case of Nannie S. McWhirter vs. The Connecticut Mutual Life Insurance Company and comprising the entire record thereof, to-wit: Complaint, Petition for removal of Cause to the United States Circuit Court, Bond for removal of Cause to the United States Circuit Court and Approval of Bond.

Witness my hand and seal of the Superior Court of the City and County of San Francisco State of California, this 2d day of February, 1893.

(Seal) M. C. Haley, Clerk.

By Thos. F. Egan, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

NANNIE S. MCWHIRTER, Plaintiff. vs. THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Defendant.	Demurrer.

Demurrer.

And now comes the Connecticut Mutual Life Insurance Company, the defendant in the above-entitled action, and demurs to the sufficiency of the first count of the Complaint of Plaintiff, on file in said action, and for grounds of such demurrer specifies the following:

I.

That said Count of the Complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

That said Count of the Complaint does not state facts sufficient to constitute a cause of action against defendant in this: that while it affirmatively appears by said first count that the contract or policy which is alleged to have existed between defendant and the said Louis B. McWhirter, mentioned in the said first count, consisted in part of a written application for said contract or policy of insurance, the said application is not set forth in said first count, nor are the terms thereof described to any extent or at all.

III.

That said first count of the complaint does not state facts sufficient to constitute a cause of action against the defendant in this: It does not appear that the money alleged to be due to plaintiff was ever demanded of the defendant at any time after thirty days following the 1st day of December, 1892, or at any time after thirty days from the time of the notice or proof of the death of said Louis B. McWhirter, alleged in said count, or at all; and in this: that it does not appear therefrom that thirty days elapsed after said December 1st, 1892, and before the commencement of this action, or after the time of the notice or proof of the death of the said Louis B. McWhirter, alleged in said count; and in this: that no facts whatever are stated in said count, showing due notice of satisfactory evidence of the death of said Louis B. McWhirter had been given to or received by the defendant at its office in Hartford, Connecticut, prior to the 1st day of December, 1892, or at all, but only conclusions of law and opinions of the plaintiff in this behalf; and in this: that it does not appear from said first count of the Complaint that the sum of $5,000, named in said policy of insurance, has not been paid or is unpaid, but only the allegation that the defendant has not paid the same; and in this: that it is not alleged therein, generally or at all, that the plaintiff has performed all or any of the terms and conditions of the said contract of insurance mentioned in said complaint.

IV.

That the said first count of the Complaint is uncertain in this: that it cannot be ascertained from said

first count, what are the terms of the application for insurance, mentioned therein, or whether the conditions set forth in said count as being part of said policy of insurance constituted the only conditions of said policy; and in this, that the date of the alleged notice and proof of the death of the said Louis B. McWhirter is not stated in said first count; and in this: that it cannot be ascertained therefrom, whether the sum of $5000 alleged to be due to plaintiff has not been paid, but only an allegation that the defendant has not paid the same.

SECOND.

And the defendant demurs to the sufficiency of the second count of said Complaint and for grounds of demurrer specifies the following:

I.

That the said second count of the Complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

That said second count of the Complaint does not state facts sufficient to constitute a cause of action against defendant in this: that while it affirmatively appears by said second count that the contract or policy which is alleged to have existed between defendant and the said Louis B. McWhirter, mentioned in the said second count, consisted in part of a written application for said contract or policy of insurance, the said application is not set forth in said second count, nor are the terms thereof described to any extent or at all.

III.

That said second count of the Complaint does not state facts sufficient to constitute a cause of action against the defendant in this: it does not appear that the money alleged to be due to plaintiff was ever demanded of the defendant at any time after thirty days following the first day of December, 1892, or at any time after thirty days from the time of the notice or proof of the death of said Louis B. McWhirter, alleged in said count, or at all; and in this: that it does not appear therefrom that thirty days elapsed after said December 1st, 1892, and before the commencement of this action or after time of the notice or proof of the death of the said Louis B. McWhirter, alleged in said count; and in this: that no facts whatever are stated in said count, showing due notice or satisfactory evidence of the death of said Louis B. McWhirter, had been given to or received by the defendant at its office in Hartford, Connecticut, prior to the first day of December, 1892, or at all, but only conclusions of law and opinions of the plaintiff in this behalf; and in this: that it does not appear from said second count of the complaint that the sum of $10,000, named in said policy of insurance has not been paid or is unpaid, but only the allegation that the defendant has not paid the same; and in this: that it is not alleged therein generally or at all, that the plaintiff has performed all or any of the terms and conditions of the said contract of insurance mentioned in said complaint.

IV.

That the said second count of the Complaint is uncertain in this: that it cannot be ascertained from said second count, what are the terms of the application for insurance, mentioned therein, or whether the conditions set forth in said count as being part of said policy of insurance constituted the only conditions of said policy; and in this: that the date of the alleged notice and proof of the death of the said Louis B. McWhirter is not stated in said second count; and in this: that it cannot be ascertained therefrom, whether the sum of $10,000 alleged to be due to plaintiff has not been paid, but only an allegation that the defendant has not paid the same.

Wherefore, defendant prays that the said Complaint be dismissed; that the defendant do have its costs herein incurred.

J. H. BUDD, P. J. HAZEN and
REEDY, CAMPBELL & METSON,
Attorneys for Defendant.

J. C. CAMPBELL,
Of Counsel.

I hereby certify that in my opinion the foregoing demurrer of defendant to the complaint of Nannie S. McWhirter is well founded in point of law, and that I am of counsel for the defendant in said action.

J. C. CAMPBELL,
Of Counsel.

UNITED STATES OF AMERICA.
Northern District of California. } ss.

James L. Fogg, being first duly sworn, deposes and says that he is an officer of the defendant named in the above-entitled action, to-wit, the General Agent thereof; that he has read the demurrer to the complaint of plaintiffs and knows the contents thereof, and that the same is well founded in point of law, and it not interposed for the purposes of delay.

JAS. L. FOGG.

Subscribed and sworn to before me this 13th day of February, 1893.

(Seal.) THOS. E. HAVEN,
Notary Public.

(Due service of within demurrer admitted this 10th day of Feb., 1893.

THORNTON & MERZBACH,
THOMPSON & KING,
Attorneys for Plaintiff.

[Endorsed]: Filed, February 13, 1893. L. S. B. Sawyer, Clerk.

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

NANNIE S. MCWHIRTER,
Plaintiff,
vs.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.

Answer.

And now comes the Connecticut Mutual Life Insurance Company, the defendant in the above entitled action, and without waiving any right or rights of said company secured to it by its demurrer to the complaint of plaintiff filed in the said action, but expressly insisting on each and every objection taken to the said complaint by the said demurrer, for answer to the first count of the said complaint, denies that each or any of the several answers, warranties or agreements contained in the application for insurance referred to in the said first count of the complaint were or are true, in the letter or spirit thereof or that said warranties or agreements have been performed or made good.

Denies on information and belief that the said Louis B. McWhirter did not die from any cause in the said policy named as an expected risk on the life of the said McWhirter, and denies on like information and belief that the said McWhirter dies on the 29th day of August, 1892, or at any other time, at the city of Fresno, county of Fresno, State of California, or at any other place, by being murdered or assassinated by any one whomsoever, and in this behalf the defendant alleges on its information and

belief that the said McWhirter at the time and place last aforesaid, died by self-destruction, that is to say, the said Louis B. McWhirter at the said time and place committed suicide, and that at the time of the said act said McWhirter was in no degree insane so as to destroy his responsibility for the said act, but on the contrary the said McWhirter was at the time of the said act perfectly sane and in complete possession of his senses and well aware of the nature of his said act of suicide.

And the defendant denies that due notice or satisfactory evidence of the death of the said McWhirter was delivered to or received by the defendant at its office at Hartford, Connecticut or anywhere, or at all, of the said death, prior to the first day of December, 1892, or at any other time.

II.

And for a further and separate defense to the alleged and pretended cause of action set forth in the first count of the said complaint, the defendant alleges that the policy of insurance described in the said first count of the complaint was issued by the defendant corporation to the said Louis McWhirter, named in the said first count, and accepted by the said McWhirter upon the following express condition and agreements contained in the said policy of insurance, to wit:

" 3rd. That the following risks are not assumed by this company under this contract: Death while residing or being or from any disease contracted while residing or being outside of the Temperate Zones, or while personally engaged or employed

or from any accident or injury received while engaged or employed in making any aeronautic voyage or excursion, or in blasting, mining, or in submarine operations, or in the manufacture, handling, use, custody or transportation of highly inflammable or explosive substances, or upon service upon any ocean, sea, sound, inlet, lake or railroad, or in any military or naval service whatsoever in any time of war, whether voluntary or otherwise, or as a member of any paid fire department, without the consent of this company previously given in writing, or death in the violation of law, or in consequence thereof, or after the conviction of felony, or by self destruction except upon satisfactory proof that the insured was so far insane as to destroy his responsibility therefor, or in a state of drunkenness or from any accident or violence received while in that state, or from any disease caused by stimulants or narcotics; and if delirium tremens, or any injury to or impairment of the health be caused by them, this policy shall thereupon and thereby be wholly forfeited and terminated.

And in each and every of the foregoing cases this policy shall become and be null and void; but this company will, upon surrender and satisfactory release hereof within one year thereafter and not otherwise returned to the assured the then net reserve upon this policy, computed upon the American Tables of Mortality and three per centum compound interest, less any balance of the years premium when not all paid at the beginning of the year and any other indebtedness to this company on account of this policy.

" 4th. That in every case in which this policy shall cease and determine or shall become and be null and

void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this company, except as hereinbefore provided."

And the defendant alleges on his information and belief that the said Louis B. McWhirter died on the 29th day of August, 1892, in the City of Fresno, County of Fresno, State of California, from a gun-shot wound inflicted by the hand of him, the said McWhirter, upon himself with suicidal intent, and therefore defendant alleges that the said McWhirter dies from self-destruction, and in this behalf defendant alleges that the said McWhirter dies from a risk not assumed but expressly excepted by the defendant in and the said policy of insurance, to wit, from self-destruction or suicide.

And the defendant further alleges that at the time of the aforesaid act of self-destruction or suicide the said McWhirter was perfectly sane, and in the complete possession of his senses and well aware of the nature of his said act.

And the defendant alleges that by reason of the premises the said policy of insurance became and was wholly null and void, and the premium paid by the said McWhirter as alleged in the said first count of the complaint became and were forfeited to the defendant. That no proof whatever has been offered or made by any one that the said McWhirter when he committed the said act of self-destruction was in any manner insane so as to be irresponsible for his said act, nor could any such proofs be made because of the aforesaid facts hereinbefore alleged.

III.

And for a further and separate defense to the alleged and pretended cause of action set forth in the said first count of the said complaint, the defendant alleges.

That the said Louis B. McWhirter mentioned in said first count of the complaint, on the 19th day of November, 1891, made an application in writing to the defendant corporation, which said application is mentioned in the said first count of the complaint for a policy of insurance in said corporation in the sum of $5,000, and that subsequently, to-wit, on the 18th day of December, 1891, a policy of insurance in the said sum of $5,000 was issued by the defendant to the said McWhirter, and is the policy of insurance referred to in the said first count of the complaint. That by the terms of said policy of insurance the said application was made a part thereof, and that said application was and is in the words and figures following, to-wit:

Every question must be fully answered above the warranty clause, every name legibly written, and every needed signature properly attached and witnessed. Every incomplete application will be returned.

APPLICATION FOR INSURANCE IN

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, OF HARTFORD, CONNECTICUT, which is the basis of and a part of the contract of insurance.

1. A. Full name of the person whose life is proposed for insurance? Louis Bransford McWhirter.

B. Married? Yes.

C. Occupations? (To be stated specifically) Present, Lawyer. Former, same.

D. Residence.

Town or City,	Fresno	
County,	Fresno	State of California.
P. O. Address,	Fresno	

2. A. When and where were you born? On the 18th day of June 1854, at Glasgow in Ky.

B. Your age next birthday? 38 years.

3. A. How much insurance is desired? ($5000) Five thousand dollars.

B. What form of Policy is desired? Twenty Payment Life.

C. To whom payable in case of loss? Nannie S. McWhirter.

D. Relationship to the life proposed? Wife.

E. To whom is the policy or its cash value to be made payable in case of maturity or surrender within the lifetime of the insured? Myself.

4. A. Is it desired to pay the premium annually? No.

In semi-annual installments? No. In quarterly installments? Yes.

(If paid in semi-annual installments, an addition of 2 per cent., and if in quarterly installments, an addition of 3 per cent. will be made to the annual premium stated in the Policy.)

B. Is it desired to make the annual premium fall due at some other date than that of the Policy? No. If so, what date?

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5. A. Is there now any insurance on your life? No. If in this company, state the No. of Policy and Amt? No........... for $........... No........... for $ ....

C. If in other Companies state (In the............Co. .... for $........... the name of each Co. or Association. (In the........ Co........ for $......... and amount insured in each?

In the.............. ....Co., for $...................

In the.............................Co., for $.......................

D. How much of the above insurance has been granted within one year past?

E. Has any Co. or Ass. ever declined or postponed granting or reviving insurance on your life, either for any particular amt. or any particular form? No.

If so, state the name of each Co. or Ass. how long since, and for what cause? ....

F. Has any opinion ever been sought from, or any statement made unto, or examination made by, or any consultation held with any person as to whether your life was insurable, except as above mentioned? Yes.

If so, what decision or opinion was then given? Granted by Connecticut Mutual one yr. ago, policy lapsed.

G. Is any application or negotiation for insurance upon your in any Co. or Ass. now pending? No.

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6. A. In what quantity and how frequently do you use beer, wine, or other alcoholic stimulants? Take one drink whiskey a day.

B. To what extend do you use tobacco or other narcotics? Dont smoke at all or chew.

C. Describe particularly your past habits in both these respects. Have been very moderate in their use.

D. Have you been, or are you engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

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7. A. Have you ever changed your residence, or traveled, on acct. of your health? No.

B. When, where, and for how long have you resided out of the U. S. or south of the southerly line of Tenn.? Resided in Tenn. prior to 1887 in 1875 for one year made a trip to Europe.

C. Have you ever applied for a pension? No. If so when and on what ground? Was it granted? ....

E. What is the present state of your health? Good.

E. Is there now existing any disease, disorder, infirmity, weakness or malformation?..........

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8. A. Have you ever had (answer yes, or no, opp. each) Difficult, Excessive, or Scanty Urination, or any disease of the Genital or Urinary Organs? No. Gravel or Calculus? No. Colic? No. Yellow Fever? No. Delirium Tremens? No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No. Aff. of Spleen? No. Abscess? No. Erysipelas? No. Cancer or any Tumor? No. Paralysis? No. Habitual Headache? No. Enlarged Vein? No. Asthma? No. Chronic Diarrhea? No. Any personal injury? No. Sunstroke? No. Syphillis? No.

Scrofula? No. Insanity? No. Dizziness or Vertigo? No. Aneurism? No. Habitual Cough? No. Piles? No. Affection of Hearing, Speech or Eyesight? Yes. Gout? No. Spitting of Blood? No. Epilepsy? No. Loss of Consciousness? No. Bronchitis? No. Shortness of Breath? No. Jaundice? No. Any discharge from the Ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of the Heart? No. Pleurisy? No. Dyspepsia? No. Affection of the Liver? No. Swelling of the feet, hands or eyelids? No.

State how frequently: the date, character, and duration of each, and its effects upon your health? Had inflamation of the ear caused by cold in 1889, lasted two weeks, no ill effects on health.

B. Have you had rheumatism? Yes. How many attacks? One, duration, two weeks, dated 1871. Was it inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath, pain in chest, or palpitation of the heart? No.

C. Have you a rupture? No. Is it single or double. Do you wear a truss, and agree to do so habitually? D. Have you been successfully vaccinated or had smallpox? Yes—No.

A. For what else have you consulted with, or been attended by a physician or surgeon during the past ten years? Slight attack of malaria. B. Give dates, duration and affect on health. Two months ago, no affect on health. C. Name and residence of such physician and surgeon. Dr. Hopkins, Fresno. D. Of your usual physician? Have none.

10. A. Living.	Age of Each.	Condition of Health of Each.
Paternal grandfather.		
Paternal grandmother.		
Maternal grandfather.		
Maternal grandmother.		
Father	65	Good.
Mother	58	Good.
How many brothers living? One	21	Good.
How many sisters living? None.		

Dead?	Age of ea.?	Cause of death of ea.?
Paternal grandfather,	85.	Old age.
Paternal grandmother,	94.	Old age.
Maternal grandfather,	60.	Phthisis.
Maternal grandmother,	84.	Pneumonia.
Father		
Mother		
How many brothers dead? One,	4.	Typhoid fever.
How many sisters dead? None.		

	Length of sickness?	Previous health?
Paternal grandfather,	Short.	Good.
Paternal grandmother,	1 week.	Good.
Maternal grandfather,	3 mos.	Active, but not strong.
Maternal grandmother,	5 days.	Good.
Father		
Mother		
How many brothers dead?	3 weeks.	Good.
How many sisters dead?		

B. Have any of the above, or of your uncles or aunts, ever had cancer, consumption, insanity, apoplexy, paralysis, or heart disease? Yes. Maternal grandfather; also uncle on mother's side died of consumption.

C. Who, on which side, and which diseases? Maternal grandfather and uncle mother's side of consumption.

D. Which parent do you resemble? Father.

11. Is there any fact relating to your physical condition, personal or family history, or habits which has not been stated in the answers to the foregoing question, and with which the Company ought to be made acquainted? No.

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12. Have you reviewed the written answers to the above questions, and are you sure they are correct? Yes.

IT IS HEREBY DECLARED AND WARRANTED, that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this application and the several answers, warranties and agreements herein contained shall be the basis of, a part of the consideration for, and a part of the Contract of Insurance, and that no statement or declaration made to any agent, solicitor, canvasser, examiner, or any other person, and not contained in this Application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and if there be, in any of the answers herein made, any fraud, untruth, evasion, or con-

cealment of facts, then any Policy granted upon this Application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said policy for its continuance as Paid-up Insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any State relating to the lapse or forfeiture of policies of insurance.

Dated at Fresno, this 19th day of November, 1891.

Witness to the signing Hereof, J. B. Hays.

Signature of the person or persons for whose benefit the insurance is to be effected. (Write the names in full.)	Nannie S. McWhirter by Louis B. McWhirter.
Signature of the person whose life is proposed for insurance. (Write the name in full.)	Louis Bransford McWhirter.

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That in said application for insurance the said McWhirter fraudulently and intentionally omitted and failed to communicate to the defendant the following facts, which facts were and are material to the said

contract of insurance, and if the same had been communicated to the defendant by said McWhirter, the defendant never would have issued to the said McWhirter the said policy of insurance, to-wit: the following facts:

The said McWhirter, prior to the making of said application for insurance in the defendant corporation had difficulties of a personal nature in the said County of Fresno, with certain persons, to the defendant unknown, and in said difficulties the said persons had threatened to murder the said McWhirter whenever and as soon as opportunity offered therefor, the said threats were believed by the said McWhirter, and that said McWhirter greatly feared by reasons of said threats and his belief therein that his, said McWhirter's life was in great and immediate danger from said persons, and acting upon such belief and solely by reason thereof the said McWhirter made the said application; and the defendant in this behalf alleges that the said McWhirter, in failing to reveal the said state of facts in relation to said difficulties and of his belief that his life was in danger thereby deliberately, knowingly, intentionally and fraudulently deceived the defendant and thereby induced the defendant to make said contract of insurance, and that by reason of the said fraud upon the defendant the said contract of insurance became, was and is wholly void and of no effect and ought not to be enforced against the defendant,—that it is expressly provided in said policy of insurance and in the said application that any concealment of facts whatever or any fraud on the part of said McWhirter did thereby make void the said policy and

thereby forfeited to the defendant all premiums paid under said policy of insurance, as fully appears by the said application, which was and is a part of said policy of insurance.

That the defendant did not know of said facts in relation to the said threats against the life of said McWhirter until after the death of the said McWhirter, to wit: until after the 29th day of August, 1892, and until after the said last named day the defendant had no means of knowing or ascertaining said facts or any of them.

And the defendant alleges that said McWhirter ought in good faith to have communicated to the defendant the said facts—that said facts were and are material to the said contract and risk and that if the same had been revealed to the defendant the defendant never would have issued the said policy of insurance to said McWhirter. That the defendant never has waived in any manner the communication of said facts, and that said facts are in no manner implied in the other facts about which communication was made by said McWhirter in said application.

IV.

And for a further and separate defense to the alleged and pretended cause of action set forth in said first count of said complaint the defendant alleges:

That said Louis B. McWhirter, mentioned in said first count of the complaint, on the 19th day of November, 1891, made an application in writing to the defendant corporation, which said application is mentioned in the said first count, for a policy of insur-

ance in said corporation in the sum of $5,000 and that subsequently, to-wit: on the 18th day of December, 1891, a policy of insurance in the sum of $5,000 was issued to said McWhirter, by the defendant and is the policy of insurance referred to in said first count. That by the terms of the said policy of insurance the said application was made a part thereof, and that said application was and is in the words and figures following, to-wit:

Every question must be fully answered above the warranty clause, every name legibly written, and every needed signature properly attached and witnessed. Every incomplete application will be returned.

APPLICATION FOR INSURANCE IN
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, OF HARTFORD, CONNECTICUT, which is the basis of and a part of the Contract of Insurance.

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1. A. Full Name of the person whose life is proposed for Insurance?	C. Occupations? (To be stated specifically.)
Louis Bransford McWhirter.	Present, Lawyer.
B. Married? Yes.	Former, Same.

D. Residence?

Town or City?	Fresno.		
County?	Fresno.	State?	California.
P. O. Address?	Fresno.		

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2. A. When and where were you born? On the 18th day of June, 1854; Glasgow, in Kentucky.

B. Your age next birthday? 38 years.

3. A. How much insurance is desired? ($5,000) Five thousand dollars. B. What form of Policy is desired? Twenty-payment Pol.

C. To whom payable in case of loss? Nannie S. McWhirter.

D. Relationship to the life proposed? Wife.

E. To whom is the Policy or its cash value payable in case of maturity or surrender within the lifetime of the Ins.? Myself.

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4. A. Is it desired to pay the premium annually? No. In semi-annual installments? No. In quarterly installments? Yes.

(If paid in semi-annual installments, an addition of 2 per cent, and if quar. installments, an addition of 3 per cent. will be made to the annual premium stated in the Policy.)

B. Is it desired to make the annual pre. fall due at some other date than that of the Policy? No. If so, what date?

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5. A. Is there now any ins. on your life? No. If so in this Co. state the No. of Pol. and Amt.? No........for $........No. for $........

C. If in other Co. state the name of each Co.) In the for $........ of Ass. and amt. insured in ea?) In the for $........

D. How much of the above insurance has been granted within one year past?

E. Has any Co. or Ass. ever declined or postponed granting of reviving ins. on your life, either for any particular amt. or in any particular form? No.

If so, state the name of each Co. or Ass., how long since, and for what cause?

F. Has any opinion ever been sought from, or any statement made by, or any consultation ever held with, any person as to whether your life was insurable, except as above mentioned? Yes.

If so, what decision or opinion was then given? Granted by Connecticut Mutual one yr. ago, policy lapsed.

G. Is any application or negotiation for insurance upon your life in any Co. or Ass. now pending? No.

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6. A. In what quantity and how frequently do you use beer, wine or other alcoholic stimulants? Take one drink whiskey a day.

B. To what extent do you use tobacco or other narcotics?

Don't smoke at all or chew.

C. Describe particularly your last habits in both these respects? Have been very moderate in their use.

D. Have you been, or are you now engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

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7. A. Have you ever changed your residence, or traveled, on acct. of your health? No.

B. When, where and for how long have you resided out of the U. S., or south of the southerly line of Tenn. Resided in Tenn. prior to 1887 in 1875 for one year made a trip to Europe.

C. Have you ever applied for a pension? No. If so when and on what grounds? Was it granted?

D. What is the present state of your health? Good.

E. Is there now existing any disease, disorder, infirmity, weakness, or malformation?

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8. Have you ever had (answer Yes or No opp. ea.) Difficult, Excessive, or Scanty Urination, or any Disease or Disorder of the Genital or Urinary Organs? No. Gravel or Calculus? No. Colic? No. Yellow Fever? No. Delirium Tremens? No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No. Affection of Spleen? No. Abscess? No. Erysipelas? No. Cancer or any Tumor? No. Paralysis? No. Habitual Headache? Enlarged Veins? No. Asthma? No. Chronic Diarrhea? No. Any Personal Injury? No. Sunstroke? No. Syphilis? No. Scrofula? No. Insanity? No. Dizziness or Vertigo? No. Aneurism? No. Habitual Cough? No. Piles? No. Affection of Hearing, Speech or Eyesight? Yes. Gout? No. No Spitting of Blood? No. Epilepsy? No. Loss of Consciousness? No. Bronchitis? No. Shortness of breath? No. Jaundice? No. Any discharge from the ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of Heart? No. Pleurisy? No. Dyspepsia? No. Affection of the Liver? No. Swelling of the feet, hands or eyelids? No.

State how frequently; the date, character, and duration of each, and its effect upon your health? Had inflammation of ear caused by cold in 1889 lasted two weeks no ill effects on health.

8. B. Have you had rheumatism? Yes. How many attacks? One. Duration? Two weeks. Dates? 1871. Was it inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath, pain in the chest, or palpitation of the heart? No.

C. Have you a rupture? No. Is it single or double? .... Do you wear a truss, and agree to do so habitually?

D. Have you been successfully vaccinated or had small-pox? Yes. No.

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9. A. For what else have you been consulted with, or been attended by a physician or surgeon during the past ten years? Slight attack of malaria.

B. Give dates, duration, and effect on health. Two mos. ago no effect on health.

C. Name and a residence of such physician or surgeon? Dr. Hopkins, Fresno.

D. Of your usual physician? Have none.

A. Living?	Age of Each.	Condition of Health of Each.
Paternal grandfather		
Paternal grandmother		
Maternal grandfather		
Maternal grandmother		
Father	85	Good.
Mother	58	Good.
How many brothers living? One.	21	Good.
How many sisters living? None.		

Dead?	Age of Each?	Cause of Death of Each?	Length of Sickness?	Previous Health?
Paternal grandfather	85	Old age.	Short.	Good.
Paternal grandmother	94	Old age.	1 week.	Good.
Maternal grandfather	60	Phthisis.	3 mos.	Active, not strong.
Maternal grandmother	84	Pneumonia.	5 das.	Good.
Father.				
Mother.				
How many brothers dead? One.	4	Typhoid fever.	3 weeks.	Good.
How many sisters dead? None.				

B. Have any of the above, or of your uncles, or aunts, ever had Cancer, Consumption, Insanity, Apoplexy, Paralysis, or Heart Disease? Yes. Maternal grandfather, also uncle on mother's side died of Consumption.

C. Who, on which side, and which disease? Maternal grandfather and uncle on mother's side of Consumption.

D. Which parent do you resemble? Father.

11. Is there any facts relating to your physical condition, personal or family history, or habits which has not been stated in the answers to the foregoing questions, and with which the Co. ought to be made acquainted? No.

12. Have you reviewed the written answers to the above question and are you sure that they are correct and true? Yes.

IT IS HEREBY DECLARED AND WARRANTED that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this Application and the several answers, warranties and agreements herein contained shall be the basis of, a part of the consideration for and a part of the Contract of Insurance, and that no statement or declaration made to any Agent, Solicitor, Canvasser, Examiner, or any other person, and not contained in this Application shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and that if there be, in any of the answers herein made, any fraud, untruth, evasion or concealment of facts, then any Policy granted upon this Application shall be null and void and all payments made thereon shall be forfeited to the Company. It is agreed that the policy hereby applied for, shall, if granted, be held to be issued and delivered at Hartford in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said policy for its continuance as Paid-up insurance, for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any state relating to the lapse or forfeiture of policies of life-insurance.

Dated at Fresno this 19th day of November, 1891.

Witness to the signing hereof.... .... } J. B. Hays.

Signature of the person or persons for whose benefit the Ins. is to be effected. (Write the names in full.) } Nannie S. McWhirter, by Louis B. McWhirter.

Signature of the person whose Life is proposed for Insurance. (Write the name in full.) } Louis Bransford McWhirter.

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That in answer to one of the questions in said application contained, to-wit, in answer to the following questions; "Is there any fact relating to your physical condition, personal or family history or habits, which has not been stated in the answers to the foregoing questions with which the company ought to be made acquainted?" the said McWhirter replied: "No."

That in truth and in fact at the time of the said applicatiou on the 19th day of November, 1891, there were facts in tho personal history of said McWhirter, which facts were well known at the date of said application to said McWhirter and unknown to the defendant with which the defendant ought to have been made acquainted by said McWhirter in the said application, to-wit: the following facts:

That said McWhirter prior to the making of the said application for insurance in the defendant corporation had difficulties of a personal nature, in said Fresno

County, with certain persons to the defendant unknown, and in said difficulties said persons had threatened to murder the said McWhirter whenever and as soon as opportunity offered therefor and that the said threats were believed by the said McWhirter and the said McWhirter greatly feared by reason of said threats and his belief therein, that his life was in danger as the defendant is informed and believes, and action upon such belief and fear and solely by reason thereof the said Mc Whirter made the said application, without revealing the facts of such threats and of his said fear and belief therein, and the defendant alleges that in and by reason the said answer to said question in relation to the personal history of said McWhirter made an express warranty in relation to matters material to said contract of insurance and to the risk assumed by the defendants in and by the said contract of insurance, and in this behalf the defendant alleges that the said answer to said question in regard to the personal history of said McWhirter, was false and known to said McWhirter to be false and was made by said McWhirter to induce the defendant to issue said policy of insurance to him, as aforesaid, and that if the defendant had received a true answer to the said question: to-wit: if the said McWhirter had stated to the defendant the above mentioned facts in relation to the personal history of said McWhirter the defendant would never have issued said policy to said McWhirter and further in this behalf the defendant alleges that the said McWhirter in answer to the said question in regard to the facts aforesaid in the personal history of said McWhirter, deliberately, and

knowingly, intentionally and frauduently deceived the defendant, and thereby induced the defendant to make said contract of insurance, that in so doing the said McWhirter committed a fraud against the defendant, and that thereby the said policy of insurance became and is wholly null and void, in accordance with the terms of said contract and application as above set forth, and ought not to be enforced against the defendant,—that if said McWhirter had truthfully made answer to said question and had revealed the fact of such threats, as aforesaid, and that said McWhirter was in consequence thereof in great fear of his life, the defendant would never have issued said policy of insurance described in said first count of the complaint.

That the defendant did not know of the said facts in relation to said threats against said McWhirter, until after the death of said McWhirter, on the 29th day of August, 1892, and until after said last named day the defendant had no means of knowing or ascertaining the said facts or any of them.

V.

And now comes the Connecticut Mutual Life Insurance Company, the defendant in the above-entitled action, and without waiving any right or rights of said company secured to it by its demurrer to the complaint of plaintiff filed in the said action, but expressly insisting on each and every objection taken to the said complaint by said demurrer, for answer to the second count of the said complaint, denies that each or any of the several answers, war-

ranties or agreements contained in the application of insurance referred to in the said second count of the complaint were or are true in the letter or spirit thereof or that said warranties or agreements have been performed or made good.

Denies on information and belief that the said Louis B. McWhirter did not die from any cause in the said policy named as an expected risk on the life of the said McWhirter, and denies on like information and belief that the said McWhirter died on the 29th day of August, 1892, or at any other time, at the City of Fresno, County of Fresno, State of California, or at any other place, by being murdered or assassinated by any one whomsoever,—and in this behalf the defendant alleges on its information and belief that the said McWhirter at the time and place last aforesaid, died by self-destruction, that is to say the said Louis B. McWhirter at the said time and place committed suicide, and that at the time of the said act said McWhirter was in no degree insane so as to destroy his responsibility for the said act, but on the contrary the said McWhirter was at the time of the said act perfectly sane and in the complete possession of his senses and well aware of the nature of his said act of suicide.

And the defendant denies that due notice or satisfactory evidence of the death of the said McWhirter was delivered to or received by the defendant at its office at Hartford, Connecticut, or anywhere, or at all of the said death, prior to the 1st day of December, 1892, or at any other time.

VI.

And for a further and separate defense to the alleged and pretended cause of action set forth in the second count of the said complaint, the defendant alleges that the policy of insurance described in the said second count of the complaint was issued by the defendant corporation to the said Louis B. McWhirter, named in the said second count, and accepted by the said McWhirter upon the following express conditions and agreements contained in the said policy of insurance, to-wit:

"3rd. That the following risks are not assumed by this company under this contract: Death while residing or being from any disease contracted while residing or being outside of the Temperate Zones, or while personally engaged or employed, or from any accident or injury received while engaged or employed in making any aeronautic voyage or excursion, or in blasting, mining or in submarine operations, or in the manufacture of highly inflammable or explosive substances, or upon service upon any ocean, sea, sound, inlet, lake or railroad, or in any military or naval service whatsoever in any time of war, whether voluntary or otherwise, or as a member of any paid fire department, without the consent of this company previously given in writing, or death in the violation of law, or in consequence thereof, or after the conviction of felony, or by self-destruction except upon satisfactory proof that the insured was so far insane as to destroy his responsibility therefor, or in a state of drunkenness, or from any accident or violence received while in that state, or from any disease caused by stimulants or nar-

cotics; and if delirium tremens, or any injury to or impairment of the health be caused by them, this policy shall thereupon and thereby be wholly forfeited and terminated.

And in each and every of the foregoing cases this policy shall become and be null and void: but this company will upon surrender and satisfactory release hereof within one year thereafter and not otherwise, return to the assured the then net reserve upon this policy, computed upon the American Tables of Mortality and three per centum compound interest, less any balance of the years premium when not all paid at the beginning of the year and any other indebtedness to this company on account of this policy.

4th. That in every case in which this policy shall cease and determine or shall become and be null and void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this company, except as hereinbefore provided."

And the defendant alleges on its information and belief that the said Louis B. McWhirter died on the 29th day of August, 1892, in the City of Fresno, County of Fresno, State of California, from a gunshot wound inflicted by the hand of him, the said McWhirter, upon himself with suicidal intent, and therefore defendant alleges that the said McWhirter died from self destruction, and in this behalf defendant alleges that the said McWhirter died from a risk not assumed but expressly excepted by the defendant in and the said policy of insurance, to wit: from self destruction or suicide.

And the defendant further alleges that at the same time of the aforesaid act of self-destruction or suicide the said McWhirter was perfectly sane and in the complete possession of his senses and well aware of the nature of his said act.

And the defendant alleges that by reason of the premises the said policy of insurance became and was wholly null and void, and the premiums paid by the said McWhirter as alleged in the said second count of the complaint became and were forfeited to the defendant. That no proof whatever has been offered or made by any one that the said McWhirter when he committed the said act of self-destruction was in any manner insane or as to be irresponsible for his said act, nor could any such proofs be made because of the aforesaid facts hereinbefore alleged.

VII.

And for further and separate defense to the alleged and pretended cause of action set forth in the second count of the said complaint the defendant alleges:

That the said Louis B. McWhirter mentioned in said second count of the complaint on the 7th day of March, 1892, made an application in writing to the defendant corporation, which said application is mentioned in the said second count of the complaint for a policy of insurance in said corporation in the sum of $10,000 and that subsequently, to-wit: on the 15th day of March, 1892, a policy of insurance in the said sum of $10,000 was issued by the defendant to the said McWhirter, and is the policy of insurance referred to in the said second count of the complaint.

That by the terms of said policy of insurance the said application was made a part thereof and that said application was and is in the words and figures following, to-wit:

Every question must be fully answered above the warranty clause, every name legibly written, and every needed signature properly attached and witnessed; every incomplete application will be returned.

APPLICATION FOR INSURANCE IN

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, OF HARTFORD, CONNECTICUT, which is the basis of and a part of the Contract of Insurance.

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1. A. Full Name of the Person whose life is proposed for Insurance?
Louis B. McWhirter
B. Married? Yes.

C. Occupations? (To be stated specifically.)
Present, Lawyer
Former, Same.

D. Residence?

Town or City Fresno
County, Fresno, State, California.
P. O. Address, Fresno.

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2. A. When and where were you born? On the 18th day of June, 1854, at Glasgow, Ky.

B. Your age next birthday? 38 yrs.

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3. A. How much insurance is desired. $10,000 (Ten Thousand Dollars). B. What form of Policy is desired? Ordinary Life. C. To whom payable in case of loss? Nannie S. McWhirter.

D. Relationship to the life proposed? Wife.

E. To whom is the policy or its cash value to be made payable in case of maturity or surrender within the lifetime of the Insured? Myself.

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4. A. Is it desired to pay the premium annually? No. In semi-annual installments? Yes. In quarterly installments? No. (If paid in semi-annual installments an addition of 2 per cent., and if in quarterly installments an addition of 3 per cent. will be made to the annual premium stated in the Policy.)

B. Is it desired to make the annual premium fall due at some other date than that of the policy? Yes. If so, what date? December 1st, 1892.

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5. A. Is there now any insurance on your life? No.

B. If in this Co., state the No. of Policy and amt.? No......... for $.....

C. If in other Co., state the name of each Co.? of Ass. and amt. insured in each?

D. How much of the above insurance has been granted within one year past?

E. Has any other Co. or Ass. ever declined or postponed granting or reviving insurance in your life, either for any particular amt. or any particular form? No. If so, state the name of each Co. or Ass., how long since, and for what cause?

F. Has any opinion ever been sought from, or any statement made to, examination made by, or any consultation ever held with, any person as to whether your life was insurable, except as above mentioned? Yes. If so, what decision or opinion was then

given? Granted by Connecticut Mutual one year ago; policy lapsed.

G. Is any application or negotiation for insurance upon your life in any Co. or Ass. now pending? No.

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6. A. In what quantity and how frequently do you use beer, wine, or other alcoholic stimulants? Take one drink whiskey a day.

B. To what extent do you use tobacco or other narcotics? Don't smoke at all or chew.

C. Describe particularly your past habits in both these respects? Have been very moderate in their use prior to 1887, made a trip to Europe in 1875 for one year.

D. Have you been, or are you now engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

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7. A. Have you ever changed your residence, or traveled, on acct, of your health? No.

B. When, where, and for how long have you resided out of the U. S., or south of the southerly line of Tenn? Resided in Tenn.

C. Have you ever applied for a pension? No. If so, when and on what grounds? Was it granted?

D. What is the present state of your health? Good.

E. Is there now any existing disease, disorder, infirmity, weakness or malformation?

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8. A. Have you ever had (Answer Yes or No opp. ea.) Difficult, Excessive, or Scanty Urination, or any Disease or Disorder of the Genital or Urinary Organs? No. Gravel or Calculus? No. Colic? No. Yellow Fever? No. Delirium Tremens?

No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No. Affection of Spleen? No. Abscess? No. Erysipelas? No. Cancer or Tumor? No. Paralysis? No. Habitual Headache? No. Enlarged Veins? No. Asthma? No. Chronic Diarrhœa? No. Any personal injury? No. Sunstroke? No. Syphilis? No. Scrofula? No. Insanity? No. Dizziness or vertigo? No. Aneurism? No. Habitual cough? No. Piles? No. Affection of hearing, speech or eyesight? Yes. Gout? No. Spitting of blood? No. Epilepsy? No. Loss of consiousness? No. Bronchitis? No. Shortness of breath? No. Jaundice? No. Any discharge from the Ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of the Heart? No. Pleurisy? No. Dyspepsia? No. Affection of the Liver? No. Swelling of the Feet, Hands or Eyelids? No. State how frequently: the date, character, and duration of each, and its effect upon your health? Had inflammation of ear caused by cold in 1889 lasted two weeks, no ill effects on health.

B. Have you had rheumatism? Yes. How many attacks? One. Duration? Two weeks. Dated? 1871. Was it inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath; pain in chest, or palpitation of the heart? No.

C. Have you a rupture? No. Is it single or double? Do you wear a truss, and agree to do so habitually?

D. Have you been successfully vaccinated or had smallpox? Yes—No.

9. A. For what else have you consulted with, or been attended by, a Physician or Surgeon during the past ten yrs? Slight attack of malaria.

B. Give dates, duration and effect on health? Two months ago no effect on health.

C. Name and residence of your physician or surgeon? Dr. Hopkins, Fresno.

D. Of your usual physician? Have none.

10. A. Living?	Age of each?	Condition of health of each?
Paternal grandfather		
Paternal grandmother		
Maternal grandfather		
Maternal grandmother		
Father,	65	Good
Mother,	58	Good
How many brothers living?		
One.	21	Good
How many sisters living?	None	

Dead?	Age of ea.?	Cause of death?	Length of sickness?	Previous Health?
Paternal grand-father,	85	Old age	Short	Good
Maternal grand-mother,	94	Old age	1 wk.	Good
Maternal grand-father,	60	Phthisis	3 mos.	Active, not strong
Maternal grand-mother	84	Pneumonia	5 das.	Good
Father				
Mother				
How many brothers dead?				
One	4	Typhoid fever	3 wks.	Good
How many sisters dead?	None.			

B. Have any of the above, or of your uncles or aunts, ever had cancer, consumption, insanity, apoplexy, paralysis or heart disease? Yes; maternal grandfather; also uncle on mother's side died of consumption.

C. Who, on which side, and which diseases? Maternal grandfather and uncle on mother's side, of consumption.

D. Which parent do you resemble? Father.

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11. Is there any fact relating to your physical condition, personal or family history, or habits, which have not been stated in the answers to the foregoing questions, and with which the Company ought to be made acquainted? No.

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12. Have you reviewed the written answers to the above questions, and are you sure that they are correct and true? Yes.

It is Hereby Declared and Warranted, that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this Application and the several answers, warranties and agreements herein contained shall be the basis of, a part of the consideration for, and a part of the Contract of Insurance, and that no statement or declaration made to any Agent, Solicitor, Canvasser, Examiner, or any other person, and not contained in this Application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and that if there be,

in any of the answers herein made, any fraud, untruth, evasion, or concealment of facts, then any Policy granted upon this Application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the Policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and it shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said policy for its continuance as Paid-up Insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any state relating to the lapse or forfeiture of policies of life insurance.

Dated at Fresno this 7th day of March, 1892.

Witness to the signing hereof,

J. B. HAYS.

Signature of the person or persons for whose benefit the insurance is to be effected. (Write the names in full.)	Nannie S. McWhirter by Louis B. McWhirter.
Signature of the person whose life is proposed for Insurance (Write the name in full.)	Louis B. McWhirter.

Edition 1891.

That the said application for insurance the said McWhirter fraudulently and intentionally omitted and failed to communicate to the defendant the following facts, which facts were and are material to the said contract of insurance and if the same had been communicated to the defendant by said McWhirter the defendant never would have issued to the said McWhirter the policy of insurance, to-wit: the following facts:

The said McWhirter immediately prior to the making of said application for insurance in the defendant corporation had difficulties of a personal nature in the said County of Fresno, with certain persons, to the defendant unknown, and in said difficulties the said persons had threatened to murder the said McWhirter whenever and as soon as opportunity offered therefor, that said threats were believed by the said McWhirter and said McWhirter greatly feared by reasons of said threats and his belief therein that his, McWhirter's, life was in great and immediate danger from said persons, and acting upon such belief and solely by reason thereof the said McWhirter made the said application; and the defendant in this behalf alleges that the said McWhirter, in failing to reveal the said state of facts in relation to said difficulties and of his belief that his life was in danger thereby deliberately, knowingly, intentionally and fraudulently deceived the defendant and thereby induced the defendant to make said contract of insurance, and that by reason of the said fraud upon the defendant the said contract of insurance became, was and is wholly void and of no effect and ought not to be enforced

against the defendant,—that it is expressly provided in said policy of insurance and in the said application that any concealment of facts whatever or any fraud on the part of McWhirter did thereby make void the said policy thereby forfeited to the defendant all the premiums paid under said policy of insurance, as fully appears by the said application, which was and is a part of said policy of insurance.

That the defendant did not know of said facts in relation to the said threats against the life of said McWhirter until after the death of the said McWhirter, to-wit: Until after the 29th day of August, 1892, and until after the said last-named day the defendant had no means of knowing or ascertaining said facts or any of them.

And the defendant alleges that said McWhirter ought in good faith to have communicated to the defendant the said facts; that said facts were and are material to the said contract and risk, and that if the same had been revealed to the defendant the defendant never would have issued the said policy of insurance to said McWhirter. That the defendant never has waived in any manner the communication of said facts and that said facts are in no manner implied in the other facts about which communication was made by said McWhirter in said application.

VIII.

And for a further and separate defense to the alleged and pretended cause of action set forth in the said second count of said complaint the defendant alleges:

That said Louis B. McWhirter, mentioned in the said second count of the complaint, on the 7th day of March, 1892, made an application in writing to the defendant corporation, which said application is mentioned in said second count, for a policy of insurance in said corporation in the sum of $10,000 and that subsequently; to-wit: on the 15th day of March, 1892, a policy of insurance in the sum of $10,000 was issued to said McWhirter by the defendant and is the policy of insurance referred to in the said second count. That by the terms of said policy of insurance the said application was made a part thereof, and that said application was and is in the words and figures following, to-wit:

Every question must be fully answered above the warranty clause, every name legibly written, and every needed signature properly attached and witnessed. Every incomplete application will be returned.

APPLICATION FOR INSURANCE IN
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, OF HARTFORD, CONNECTICUT, which is the basis of and a part of the Contract for Insurance.

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1. A. A full name of the person whose life is proposed for Ins.	C. Occupations? (To be stated specifically)
Louis B. Mc Whirter.	Present, Lawyer
B. Married? Yes.	Former, Same.

D. Residence?

Town or City	Fresno	
County	Fresno	State, California.
P. O. Address	Fresno	

2. A. When and where were you born? On the 18th day of June, 1854, Glasgow, in Ky.

B. Your age next birthday? 38 yrs.

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3. A. How much insurance is desired? $10,000 (Ten Thousand Dollars.) B. What form of Policy is desired? Ordinary life.

C. To whom payable in case of loss? Nannie S. McWhirter.

D. Relationship to the life proposed? Wife.

E. To whom is the Policy or its cash value to be made payable in case of maturity or surrender within the lifetime of the Insured? Myself.

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4. A. Is it desired to pay the premium annually? No. In semi-annual installments? Yes. In quarterly installments? No. (If paid in semi-annual installments, an addition of 2 per cent., and if in quarterly installments, an addition of 3 per cent. will be made to the annual premium stated in the Policy).

B. Is it desired to make the annual premium fall due at some other date than that of the Policy? Yes. If so, what date? December 1st, 1892.

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5. A. Is there now any insurance on your life? No.

B. If in this Co. state the No. of the Policy and amt?

No.......... for $.................. No.......for $..................

C. If in other Co. state the name of each Co. or Ass. and amt. insured in each? In the......................
for $...In the......................
for $..

D. How much of the above insurance has been granted within one year past?

E. Has any Co. or Ass. ever declined or postponed granting or reviving insurance on your life, either for any particular amt. or any particular form? No. If so, state the name of each Co. or Ass., how long since, and for what cause.

F. Has any opinion ever been sought from, or any statement made to, or examination made by, or any consultation held with, any person as to whether your life was insurable, except as above mentioned? Yes. If so, what decision or opinion was then given? Granted by Connecticut Mutual one year ago policy lapsed.

G. Is any application or negotiation for insurance upon your life in any company or association now pending? No.

6. A. In what quantity and how frequently do you use beer, wine, or other alcoholic stimulants? Take one drink whiskey a day.

B. To what extent do you use tobacco or other narcotics? Don't smoke at all or chew.

C. Describe particularly your past habits in both these respects. Have been very moderate in their use prior to 1887 made a trip to Europe in 1875 for one year.

D. Have you been, or are you now engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

7. A. Have you ever changed your residence, or traveled on account of your health? No.

B. When, where and for how long have you resided out of the U. S., or South of the southerly line of Tennessee? Resided in Tenn.

C. Have you applied for a pension? No. If so when and on what grounds? Was it granted?

D. What is the present state of your health? Good.

E. Is there now any existing disease, disorder, infirmity, weakness or malformation?

8. A. Have you ever had (Answer · Yes or No opposite each) Difficult, Excessive, or scanty Urination, or any disease or disorder, infirmity, of the Genital or Urinary Organs? No. Gravel or Calculus? No. Colic? No. Yellow Fever? No. Delirium Tremens? No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No. Affection of Spleen? No. Abscess? No. Erysipelas? No. Cancer or any Tumor? No. Paralysis? No. Habitual Headache? No. Enlarged Veins? No. Asthma? No. Chronic Diarrhoea? No. Any personal injury? No. Sunstroke? No. Syphilis? No. Scrofula? No. Insanity? No. Dizziness or Vertigo? No. Aneurism? No. Habitual Cough? No. Piles? No. Affection of Hearing, Speech, or Eyesight? Yes. Gout? No. Spitting of Blood? No. Epilepsy? No. Loss of Consciousness? No. Bronchitis? No. Shortness of Breath? No. Jaundice? No. Any *d*ischarge from the ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of the Heart? No. Pleurisy? No. Affection of Liver? No. Swelling of feet or hands or eyelids? No.

State how frequently, the date, character and duration of each, and its effect upon your health? Had inflammation of the ear caused by cold in 1889, lasted two weeks, no ill effect on health.

B. Have you had Rheumatism? Yes How many attacks? One. Duration? Two weeks. Dates? In 1871. Was it Inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath, pain in chest, or palpitation of the heart? No.

C. Have you a rupture? No. Is it single or double?

Do you wear a truss, and agree to do so habitually?

D. Have you been successfully vaccinated or had small-pox? Yes—No.

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9. A. For what else have you consulted with, or been attended by, a physician or surgeon during the past ten years? Slight attack of malaria.

B. Give dates, duration, and effect on health. Two months ago; no effect on health.

C. Name and residence of such physician or surgeon. Dr. Hopkins, Fresno.

D. Of your usual physician? Have none.

10. A. Living?	Age of Each?	Condition of Health of Each?
Paternal grandfather		
Paternal grandmother		
Maternal grandfather		
Maternal grandmother		
Father	65	Good
Mother	65	Good
How many brothers living? One	21	Good
How many sisters living? None		

Dead?	Cause of Death of Each?	Length of Sickness?	Age?	Previous Health?
Paternal grandfather	Old age.	Short.	85	Good.
Paternal grandmother	Old age.	1 week.	94	Good.
Maternal grandfather	Phthisis.	3 mos.	60	Active, not strong.
Maternal grandmother	Pneumonia.	5 days.		Good.
Father				
Mother				
How many brothers dead? One	Typhoid fever.	3 weeks.	4	Good.
How many sisters dead? None.				

10. B. Have any of the above, or of your uncles or aunts, ever had Cancer, Consumption, Insanity, Apoplexy, Paralysis, or Heart Disease? Yes. Maternal grandfather, also uncle on mother's side died of Consumption.

C. Who, on which side, and which diseases? Maternal grandfather and uncle on mother's side of Consumption.

D. Which parent do you resemble? Father.

11. A. Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted? No.

12. Have you reviewed the written answers to the above questions, and are you sure they are correct and true? Yes.

IT IS HEREBY DECLARED AND WARRANTED, that the above are fair and true answers in all respects to the foregoing questions; and it is agreed by the undersigned that this Application and the several answers, warranties, agreements, herein contained shall be the basis of, a part of the consideration for, and a part of the Contract of Insurance, and that no statement or declaration made to any Agent, Solicitor, Examiner, or any other person, and not contained in this Application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the company, or as charging it with any liability by reason thereof; and if there be, in answers herein made, any fraud, untruth, evasion, or concealment of facts, then any Policy granted upon this Application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said policy for its continuance as paid-up insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any State relating to the lapse or forfeiture of policies of life insurance.

Dated at Fresno, this 7th day of March, 1892.

Witness to the signing hereof,	J. B. Hays.
Signature of the person or persons for whose benefit the insurance is to be effected. (Write the names in full.)	Nannie S. McWhirter, by Louis B. McWhirter.
Signature of the person whose life is proposed for insurance. (Write the name in full.)	Louis B. McWhirter.

Edition 1891.

That in answer to one of the questions in said application contained, to-wit: in answer to the following questions, "Is there any fact relating to your physical condition, personal or family history or habits, which has not been stated in the answers to the foregoing questions with which the company ought to be made acquainted?" the said McWhirter replied: "No."

That in truth, and in fact at the time said application, to-wit, on the 7th day of March, 1892, there were facts in the personal history of the said McWhirter, which facts were well known at the date of said application to said McWhirter and unknown to the defendant, with which the defendant ought to have been made acquainted by said McWhirter in said application, to-wit, the following facts:

The said McWhirter prior to the making of said application for insurance in the defendant corporation had difficulties of a personal nature, in said Fresno

county, with certain persons to the defendant unknown, and in said difficulties said persons had threatened to murder the said McWhirter whenever and as soon as opportunity offered therefor and that the said threats were believed by the said McWhirter, and said McWhirter greatly feared by reason of said threats and his belief therein that his life was in danger, as the defendant is informed and believes, and acting upon such belief and fear and solely by reason thereof the said McWhirter made the said application, without revealing the facts of such threats and of his said fear and belief therein—and the defendant alleges that in and by the said answer to said question in relation to the personal history of said McWhirter, the said McWhirter made an express warranty in relation to matters material to said contract of insurance and to the risk assumed by the defendants in and by the said contract of insurance, and in this behalf the defendant alleges that the said answer to said question in regard to the personal history of said McWhirter, was false and known to said McWhirter to be false and was made by said McWhirter to induce the defendant to issue said policy of insurance to him, as aforesaid, and that if the defendant had received a true answer to the said question, to wit: If the said McWhirter had stated to the defendant the above mentioned facts in relation to the personal history of said McWhirter, the defendant never would have issued said policy to said McWhirter and further in this behalf the defendant alleges that the said McWhirter, in answer to said question in regard to the facts aforesaid iu the personal history of

said McWhirter, deliberately, knowingly, intentionally and fraudulently deceived the defendant, and thereby induced the defendant to make said contract of insurance, that in so doing the said McWhirter committed a fraud against the defendant and that thereby the said policy of insurance became and is wholly null and void in accordance with the terms of said contract and application as above set forth and ought not to be enforced against the defendant,—that if said McWhirter had truthfully made answer to said question and had revealed the facts of such threats as aforesaid, and that said McWhirter was in consequence thereof in great fear of his life, the defendant would never have issued said policy of insurance described in said second count of the complaint.

That the defendant did not know of the said facts in relation to said threats against said McWhirter, until after the death of said McWhirter on the 29th day of August, 1892, and until after said last named day the defendant had no means of knowing or ascertaining the said facts or any of them.

Wherefore the defendant prays that it be adjudged and decreed that the plaintiff take nothing by her said complaint, and that the policies of insurance described in the said complaint be decreed to be null and void, and that the premiums paid by said McWhirter on the same, as alleged in said complaint be declared and adjudged to be forfeited to the defendant in accordance to the terms of said policies of insurance for

costs of suit and for such other and further relief as may seem just and equitable to this Honorable Court.

JAMES H. BUDD, P. J. HAZEN and
REDDY, CAMPBELL & METSON,
Attorneys for Defendant.

J. C. CAMPBELL,
Of Counsel for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

James L. Fogg being duly sworn, deposes and says, that he is an officer and attorney of the defendant corporation, named in the above entitled action. That he has heard read the above and foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

That the defendant is absent from the State of California, to-wit: is in the State of Connecticut; that affiant resides in the County of Alameda, State of California, and that the facts stated in the said answer are within the knowledge of affiant—that for the foregoing reason affiant makes this affidavit and verification for and in behalf of the said defendant.

Subscribed and sworn to before me this 1st day of July, 1893.

JAMES L. FOGG.

(Seal) CHARLES H. PHILLIPS,
Notary Public.

Due service of within answer by copy admitted 3rd day of July, 1893.

THORNTON & MERZBACH,
Attorneys for Plaintiff.

[Endorsed]: Filed July 3rd, 1893. W. J. Costigan, Clerk.

United States of America, Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

NANNIE S. MCWHIRTER, Plaintiff, vs. THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Defendant.	No. 11,762.

Verdict of Jury.

We the jury find for the plaintiff in the sum of Sixteen thousand one hundred thirty seven and 50–100 ($16,137 50–100) dollars.

Foreman,
J. J. VASCONCELLOS.

[Endorsed]: Filed February 9th, 1894. W. J. Costigan, Clerk.

Order on Demurrer.

At a stated term, to-wit: The February term, A. D. 1893, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court

Room in the City and County of San Francisco, on Monday, the 29th day of May, in the year of our Lord One thousand eight hundred and ninety-three.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

NANNIE S. McWHIRTER,
vs.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.
No. 11,762.

The demurrer to the Complaint herein heretofore argued and submitted to the Court for consideration and decision, having been duly considered, it is ordered that said demurrer be and the same hereby is overruled, with leave to the defendant to answer in twenty days.

[Endorsed]: Filed Feb'y 10th, 1894. W. J. Costigan, Clerk.

United States of America, Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

NANNIE S. McWHIRTER,
Plaintiff,
vs.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.
No. 11762.

Judgment.

This cause came on regularly for trial. The said parties appeared by their attorneys, Crittenden Thornton and W. P. Thompson, Esqs., appearing for plaintiff

and J. C. Campbell and J. H. Budd, Esqs., for defendant. A jury of twelve persons was regularly impanelled and sworn to try this cause. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, argument of Counsel and instructions of the Court, the jury retired to deliberate upon a verdict, and subsequently returned into Court, and being called all answered their names and presented the following verdict:

United States of America, Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

NANNIE S. MCWHIRTER,
Plaintiff,
vs.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.
} No. 11762.

We, the jury find for the plaintiff in the sum of sixteen thousand one hundred thirty seven and 50–100 ($16137 50–100) dollars.

J. J. VASCONCELLAS,
Foreman.

Wherefore, by virtue of the law and by reason of the premises, it is ordered, adjudged and decreed, that Nannie S. McWhirter, plaintiff aforesaid have, and recover from said defendant "The Connecticut Mutual Life Insurance Company" the sum of sixteen thousand one hundred and thirty-seven and 50-100 ($16,137

50-100) dollars, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $.

Entered Feby. 10th, 1894.

W. J. COSTIGAN,
Clerk.

I hereby certify the foregoing to be a full, true and correct copy of the original judgment entered in the said cause.

Attest my hand and the seal of said Circuit Court this 10th day of Feby. 1894.

(Seal.) W. J. COSTIGAN,
Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

N. S. McWHIRTER,
vs.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.
} No. 11,762.

I, W. J. Costigan, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 10th day of February, 1894.

(Seal.) W. J. COSTIGAN,
Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

NANNIE S. MCWHIRTER,
Plaintiff,
vs.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.

Notice of Motion for New Trial.

To the Plaintiff above named and to Messrs. Thornton & Merzbach and Thompson & King, her attorneys:

You will please take notice that the defendant above named intends to move the Court to set aside and vacate the verdict of the jury and grant a new trial herein upon the following grounds:

I.

Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

II.

Misconduct of the jury.

III.

Newly discovered evidence material for the defendant, which it could not with reasonable diligence have discovered and produced at the trial.

IV.

Insufficiency of the evidence to justify the verdict.

V.

That the verdict is against law.

VI.

Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon a Bill of Exceptions to be hereafter prepared and settled, upon affidavits and upon the minutes of the Court.

And you are further notified that said motion will be made on the 26th day of February, 1894, at the opening of Court on that day, or as soon thereafter as counsel can be heard, or if the Bill of Exceptions be not settled on said day, said defendant will apply to the Court to continue said motion until said Bill of Exceptions be settled; and if said motion cannot be heard on the 26th day of February, 1894, said motion will be made on the next succeeding motion day at which it can be heard and notice thereof will be given.

JAMES H. BUDD,
REDDY, CAMPBELL & METSON,
Attorneys for Defendant.

Due service of within Notice admitted this 17th day of February, 1894.

THORNTON & MERZBACH,
THOMPSON & KING,
Attorneys for Plaintiff.

[Endorsed]: Filed February 19th, 1894. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

Hon. W. B. GILBERT, Judge.

NANNIE S. MCWHIRTER,
Plaintiff,
vs.
CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.

Draft of a Bill of Exceptions.

Be it remembered that this cause came on regularly for trial before the court and a jury on the 23rd day of January, 1893, the plaintiff appearing by her attorneys, W. P, Thompson, Esq. and Messrs. Thornton & Merzbach, and the defendant appearing by its attorneys, James H. Budd, Esq., and Messrs. Reddy, Campbell & Metson, and to maintain the issues on its part, defendant offered the following evidence:

Mr. Campbell—If your honor please we will offer in evidence the policies and applications, as follows:

No. 197, 244. Rated Age 37.

EXHIBIT NO. 1.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONN.

IN CONSIDERATION of the application for this insurance, which is the basis of and a part of this contract, and a copy whereof is hereunto annexed, and of the several answers, warranties and agreements therein contained, and of the annual premium of One hundred and eighty six 50–100 to be paid to them

on the eighteenth day of December, 1891, and on or before the same date in every year until twenty annual premiums shall have been paid,

DO HEREBY INSURE THE LIFE OF

Louis B. McWhirter (the insured), of Fresno, County of Fresno, State of California, for the term of his natural life. In the sum of Five thousand dollars, to be paid to Nannie S. McWhirter (the Assured), wife of the said Insured, for her sole use and benefit, or, in case of her decease before payment, to his children, or their descendants, if any survive, or to their guardians if under age.) or, if none, to his executors, administrators or assigns, within thirty days after due notice and satisfactory evidence of the death of the said Insured while this Contract is in full force and effect shall have been received at the office of said Company at Hartford, Conn., less any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this Company on account of this policy: And, if, after the payment, as above, of the number of annual premiums required by the Table of Paid-up Insurance printed hereon and hereby made a part of this contract, any subsequent premium or installment or premium be not paid when due, said Company do thereupon and thereafter and upon the same considerations hereinbefore set forth, but without further payment of premiums, insure said life for said term but only in a sum to be ascertained by said table, and to be payable as above provided: AND, at the end of ten years from the date above written, or at the end of

each period of five years thereafter, this Policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this Company will pay to the person or persons thereunto designated in the aforesaid application a Cash Value therefor, to be ascertained by the Table of Cash Values printed hereon and hereby made a part of this Contract, but only upon surrender and release hereof by such person or persons within thirty days after the end of such period; And any and every sum due under this Policy shall be payable only at the office of said Company in Hartford, Conn., and upon surrender and satisfactory release hereof:

Subject to the Conditions and Agreements upon the second page of this Policy which are hereby referred to and made a part of this Contract.

In Witness Whereof, the said The Connecticut Mutual Life Insurance Company have, by their President and Secretary, signed and delivered this Contract, in the City of Hartford, State of Connecticut, this Eighteenth day of December, A. D., one thousand eight hundred and ninety one.

Edward M. Bunce, Secretary.
John M. Taylor, Vice-President.

This Policy is Issued and Accepted upon the following express Conditions and Agreements, referred to on the first page and made a part of this Contract:

1st. That this contract of insurance is wholly expressed and contained in this Policy and the Application therefor, and that no alteration, change, modifi-

cation, waiver or subsequent agreement whatever respecting this Policy shall be binding on said Company unless made in writing signed by the executive officers thereof; and that Agents of the Company have no power or authority to make, alter, change or modify any of the terms, conditions, or agreements of this Policy or to waive forfeitures thereof.

2d. That this Policy shall not be in force and binding on this Company until the advance premium hereon shall have been actually paid during the lifetime of the insured ; and that if any subsequent Premium, or installment of Premium, on this Policy be not paid when due, then this Policy shall cease and determine and become and be null and void, except as hereinbefore provided after the payment of the requisite number of annual premiums; and that no premium on this Policy shall be considered as paid unless a receipt shall be given therefor, signed by the President or Secretary of the Company, and such receipt is the sole evidence of the authority of any Agent to receive any premium on account of this Policy; and that all Premiums or other payments on account of this Policy shall be payable at the office of the Company in Hartford, Conn., and not elsewhere; but for the convenience of the person paying the same, such receipts may be sent to any agent or correspondent of the Company for collection, and payment made to such agent or correspondent shall be held to have been made at said office of the Company.

3d. That the following risks are not assumed by this company: Death while residing or being, or from any disease contracted while residing or being, outside

the Temperate Zones, or while personally engaged or employed, or from any accident or injury received while engaged or employed, in making any aeronautic voyage or excursion, or in blasting, mining, or in any submarine operations, or in the manufacture, handling, use, custody, or transportation, of highly inflamable or explosive substances, or upon service on any ocean, sea, sound, inlet, river, lake or railroad, or in any military or naval service whatsoever in time of war, whether voluntary or otherwise, or as a member of any paid fire department without the consent of this company previously given in writing; or death in the violation of law, or in consequence thereof, or after conviction of felony, or by self-destruction except upon satisfactory proof that the insured was so far insane as to destroy his responsibility therefor, or in a state of drunkenness, or from any accident or violence received while in that state, or from any disease caused by stimulants or narcotics; and if delirium tremens, or any injury to or impairment of the health be caused by them, this policy shall thereupon and thereby be wholly forfeited and terminated.

In each and every of the foregoing cases this policy shall become and be null and void; but the company will, upon surrender and satisfactory release hereof within one year thereafter and not otherwise, return to the assured the then net reserve upon this policy, computed upon the American Table of Mortality and three per centum compound interest, less any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this company on account of this Policy.

4th. That in every case in which this Policy shall cease and determine or shall become and be null and void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this company, except as hereinbefore provided.

5th. That no assignment of this Policy shall be valid; but the company shall have power at any time, but at its own discretion, to accept a surrender and discharge of the same by the assured and the payee of the same by the assured and the payee of the cash value at the stipulated periods.

COPY OF APPLICATION FOR INSURANCE IN THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, WHICH IS THE BASIS OF AND A PART OF THE CONTRACT OF INSURANCE.

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1. A. Full name of the person whose life is proposed for insurance? Louis Bransford McWhirter. B. Married? Yes. C. Occupation: (To be stated specifically). Present, Lawyer, former, same. D. Residence? Town or City, Fresno, County, Fresno, State, California, P. O. Address, Fresno.

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2. When and where were you born? On the 18th day of June, 1854, at Glasgow in Kentucky. B. Your age next birthday? 38 years.

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3. A. How much insurance is desired? ($5000) five thousand dollars. B. What form of policy is desired? Twenty Payment Life. C. To whom payable in case of loss? Nannie S. McWhirter, L. B. M. D. Relationship to the life proposed? Wife. E. To whom is the policy or its cash value to be made pay-

able in case of maturity or surrender within the lifetime of the Insured? Myself.

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4. A. Is it desired to pay the premium annually? No. In semi-annual installments? No. In quarterly installments? Yes. (If paid in semi-annual installments, an addition of 2 per cent., and if in quarterly installments, an addition of 3 per cent. will be made to the annual premium stated in the policy). B. Is it desired to make the annual premium fall due at some other date than that of the policy? No. If so, what date?

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5. A. Is there now any insurance on your life? No. B. If in this Company, state the No. of Policy and Amount? No .... for $.. No..................................for $............ ....C. If in other Companies, state the name of each Company or Association, and amount insured in each? In the Co., for $. In the Co. for $. In the Co. for $. In the Co. for $. D. How much of above insurance has been granted within one year past? . F. Has any Company or Association ever *declined* or *postponed* granting or reviving insurance on your life, either for any particular amount, or in any particular form? No. If so, state the name of each Company or Association, how long since, and for what cause? F. Has any opinion ever been sought from, or any statement made to, or examination made by, or any consultation ever had with, any person as to whether your life was insurable, except as above mentioned? Yes. If so, what

decision or opinion was then given?. Granted by Conn. Mutual one year ago; Policy lapsed. G. Is any application or negotiation for insurance upon your life in any Company or Association now pending? No.

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6. A. In what quantity and how frequently do you use beer, wine, or other alcoholic stimulants? Take one drink whiskey a day. B. To what extent do you use tobacco or other narcotics? Don't smoke at all, nor chew. C. Describe particularly your past habits in both respects? Have been very moderate in their use. D. Have you been, or are you now engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

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7. A. Have you ever changed your residence, or traveled on account of your health? No. B: When, where, and for how long have you resided out of the United States, or south of the southerly line of Tennessee? Resided in Tennessee prior to 1887; made a trip to Europe in 1875 for one year. C. Have you ever applied for a pension? No. If so. when and on what grounds? .... Was it granted? .... D. What is the present state of your health? Good. E. Is there now existing any disease, disorder, infirmity, weakness or malformation? No.

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8. A. Have you ever had (answer Yes or No opposite each) difficult, excessive or scanty urination or any disease or disorder of the genital or urinary organs? No. Gravel or calculus? No. Colic? No. Yellow fever? No. Delirium tremens? No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No.

Affection of spleen? No. Abscess? No. Erysipelas? No. Cancer or any tumor? No. Paralysis? No. Habitual headache? No. Enlarged veins? No. Asthma? No. Chronic diarrhœa? No. Any personal injury? Sunstroke? No. Syphilis? No. Scrofula? No. Insanity? No. Distress or vertigo? No. Aneurism? No. Habitual congh? No. Piles? No. Affection of hearing, speech or eyesight? Yes. L. B. M. Gout? No. Spitting of blood? No. Epilepsy? No. Loss of consciousness? No. Bronchitis? No. Shortness of breath? No. Jaundice? No. Any discharge from the ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of the heart? No. Pleurisy? No. Dyspepsia? No. Affection of liver? No. Swelling of the feet, hands or eyelids? No. State how frequently; the date, character and duration of each, and its effect upon your health? Had inflammation of ear caused by cold in 1889, lasted two weeks; no ill effects on hearing or health. B. Have you had rheumatism? Yes. How many attacks? One. Duration? Two weeks. Dates? In 1871. Was it inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath, pain in the chest or palpitation of the heart? No. C. Have you a rupture? No. Is it single or double? . Do you wear a truss, and agree to do so habitually? No. D. Have you been successfully vaccinated or had smallpox? Yes—no.

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9. A. For what else have you consulted with, or been attended by, a physician or surgeon during the the past ten years? Slight attack of malaria. B. Give dates, duration and effect on health? Two months

ago; no effect on health. C. Name and residence of such physician or surgeon? Dr. Hopkins, Fresno. Of your usual physician? Have none.

10 A. Living.	Age of Each.	Condition of Health of Each.
Paternal grandfather		
Paternal grandmother		
Maternal grandmother		
Father	65	Good.
Mother	58	Good.
How many brothers living? One.	21	Good.
How many sisters living? None.		

Dead?	Age of Each?	Cause of Death of Each?	Length of Sickness?	Previous Health?
Paternal grandfather	85	Old age.	Short.	Good.
Paternal grandmother	94	Old age.	1 week.	Good.
Maternal grandfather	60	Phthisis.	3 mos.	Active but not strong.
Maternal grandmother	84	Pneumonia.	3 days.	Good.
Father				
Mother				
How many brothers dead? One.	4	Typhoid fever.	3 weeks.	Good.
How many sisters dead? None.				

B. Have any of the above, or any of your uncles or aunts, ever had cancer, consumption, insanity, apoplexy, paralysis or heart disease? Yes. Maternal grandfather also uncle on mother's side died of consumption. C. On which side, and which diseases? Maternal grandfather and uncle mother's side of consumption. D. Which parent do you resemble? Father.

11. Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the Company ought to be made acquainted? No.

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12. Have you reviewed the written answers to the above questions, and are you sure they are correct and true? Yes.

IT IS HEREBY DECLARED AND WARRANTED that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this application and the several answers, warranties and agreements herein contained shall be the basis of, a part of the consideration for, and a part of the Contract of Insurance, and that no statement or declaration made to any Agent, Solicitor, Canvasser, Examiner, or any other person, and not contained in this Application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and that if there be, in any of the answers herein made, any fraud, untruth, evasion, or concealment of facts, then any Pol-

icy granted upon this Application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the Policy hereby applied for shall, if granted, be held to be issued and delivered at Hartlord, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said Policy for its continuance as Paid-up Insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any State relating to the lapse or forfeiture of policies of life insurance.

Dated at Fresno this 19th day of November, 1891.

Signature of the person or persons for whose benefit the insurance is to be effected. (Write the names in full.) } Nannie S. McWhirter, by Louis B. McWhirter.

Signature of the person whose life is proposed for Insurance. (Write the name in full.) } Louis Bransford McWhirter.

Witness the signing hereof, J. B. Hays.

[Endorsed]: No. 197,244. Term of Life. Twenty Annual Premiums. The Connecticut Mutual Life Insurance Company, of Hartford, Connecticut. Sum insured, $5,000. On the life of Louis B. McWhirter. Annual Premium, $186.50–100. The Annual Premium on this Policy is due and payable on the Eighteenth day of December. Form 182. Ex'd by J.

OFFICE OF THE

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Hartford, Conn., Mar. 15, 1892.

No. 198,281.

$67.41–100.

In consideration of sixty-seven 41–100 dollars Policy No. 198,281, on the life of Louis B. McWhirter is hereby made of force and binding, subject to all the conditions thereof, until the first day of Dec. 1892.

Authority is hereby given to John B. Hays, Agt. to receive the the above stated amount, and receipt for the same hereon.

This payment is not an "Annual Premium" but is made merely to purchase temporary insurance between this date and the date on which the Annual Premium becomes due, and adds nothing to the value of the Policy in either Paid-up insurance or cash, in case of non-payment or surrender.

EDWARD M. BUNCE,
Secretary.

Received amount as above, this 15 day of March, 1892.

By J. B. HAYS, Agt.

Authority is hereby given to accept payment on my acct. of the amount herein stated as due, and to receipt for the same.

....

EXHIBIT No. 2.

No. 198,281. Rated Age. 38.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, OF HARTFORD, CONN.

IN CONSIDERATION, of the application for this insurance, which is the basis of and a part of this Contract, and a copy whereof is hereunto annexed, and of the several answers, warranties and agreements therein contained, and of the annual premium of Two hundred and eighty nine 50–100 dollars to be paid to them on the First day of December, 1892, and on or before the same date in every year until twenty annual premiums shall have deen paid, Do hereby insure the life of Louis B. McWhirter (the Insured), of Fresno, County of Fresno, State of California, for the term of his natural life, in the sum of Ten Thousand Dollars to be paid to Nannie S. McWhirter (the Assured) wife of the said Insured, for her sole use and benefit, or, in case of her decease before payment, to his children, or their descendants, if any survive, (Or to their guardians if under age), or, if none, to his executors, administrators, or assigns, within thirty days after due notice and satisfactory evidence of the death of the said Insured while this Contract is in full force and effect shall have been received at the office of said Company in Hartford, Conn., less any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this Company on account of this Policy; AND, if, after the payment, as above, of the number of annual premiums required by the table of paid-up insurance printed hereon and hereby made a part of this Contract, any subsequent

premium or installment premium be not paid when due, said Company do thereupon and thereafter and upon the same considerations hereinbefore set forth, but without further payment of premiums, insure said life for said term but only in a sum to be ascertained by said table, and to be payable as above provided; AND, at the end of ten years from the date above written, or at the end of each period of five years thereafter, this Policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this Company will pay to the person or persons thereunto designated in the aforesaid application a cash value therefor, to be ascertained by the Table of Cash Values printed hereon and hereby made a part of this contract, but only upon surrender and release hereof by such person or persons within thirty days after the end of such period; AND, any and every sum due under this Policy shall be payable only at the office of said Company in Hartford, Conn., and upon surrender and satisfactory release hereof.

SUBJECT TO THE CONDITIONS and agreements upon the second page of this policy, which are hereby referred to and made a part of this contract.

IN WITNESS WHEREOF, the said The Connecticut Mutual Life Insurance Company have, by their President and Secretary, signed and delivered this contract in the City of Hartford, State of Connecticut, this Fifteenth day of March, A. D. One thousand eight hundred and ninety-two.

.................................., President.

EDWARD M. BUNCE, Secretary.

THIS POLICY is issued and accepted upon the following express conditions aad agreements, referred to on the first page and made a part of this contract:

1st. That this Contract of Insurance is wholly expressed and contained in this policy, and the application therefor, and that no alteration, change, modification, waiver, or subsequent agreement whatever respecting this Policy shall be binding on said company unless made in writing, signed by the executive officers thereof; and that agents of the company have no power or authority to make, alter, change, or modify any of the terms, conditions, or agreements of this Policy, or to waive forfeitures thereof.

2nd. That this policy shall not be in force and binding on this Company until the advance Premium hereon shall have been actually paid during the lifetime of the insured; and that if any subsequent Premium, or installment of Premium, on this Policy be not paid when due, then this Policy shall cease and determine and become and be null and void, except as hereinbefore provided after the payment of the requisite number of annual premiums; and that no Premium on this Policy shall be considered as paid unless a receipt shall be given therefor, signed by the President or Secretary of the Company, and such receipt is the sole evidence of the authority of any Agent to receive any Premium on account of this Policy; and that all premiums or other payments on account of this Policy are payable at the office of the Company in Hartford, Conn., and not elsewhere; but for the convenience of the person paying the same, such receipt may be sent to any agent or correspondent of the Company for col-

lection, and payment to such agent or correspondent shall be held to have been made at said office of the Company.

3rd. That the following risks are not assumed by this Company under this Contract; Death while residing or being, or from any disease contracted while residing or being, outside the Temperate Zones, or while personally engaged or employed, or from any accident or injury received while engaged or employed, in making any aeronautic voyage or excursion, or in blasting, mining, or in any submarine operations, or in the manufacture, handling, use, custody or transportation of highly inflammable or explosive substances, or upon service on any ocean, sea, sound, inlet, river, lake or railroad, or in any military or naval service whatsoever in time of war, whether voluntary or otherwise, or as a member of any paid fire department, without the consent of the Company previously given in writing; or death in violation of law, or in consequence thereof, or after conviction of felony, or by self destruction, except upon satisfactory proof that the insured was so far insane as to destroy the responsibility therefor, or in a state of drunkenness, or from any accident or violence received while in that state, or from any disease caused by stimulants or narcotics, and if delirium tremens, or any injury to or impairment of the health be caused by them, this Policy shall thereupon and thereby be wholly forfeited and terminated.

In each and every of the foregoing cases this Policy shall become and be null and void; but the Company will, upon surrender and satisfactory release hereof

within one year thereafter and not otherwise, return to the Assured the then net reserve upon this Policy, computed upon the American Table of Mortality and three per centum compound interest, less any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this Company on account of this Policy.

4th. That in every case in which this Policy shall cease and determine and shall become and be null and void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this Company, except as hereinbefore provided.

5th. That no assignment of this Policy shall be valid; but the Company shall have power at any time, but at its own discretion, to accept a surrender and discharge of the same by the assured and the payee of the cash value at stipulated periods.

Copy of Application for Insurance in The Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, which is the basis of, and a part of the Contract of Insurance.

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1. A. Full name of the person whose life is proposed for insurance? Louis Bransford McWhirter. B. Married? Yes. C. Occupations; (To be stated specifically). Present, lawyer. Former? Same. D. Residence? Town or City, Fresno, County, Fresno, State, California. P. O. Address, Fresno.

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2. A. When and where were you born? On the 18th day of June, 1854, at Glasgow, in Kentucky. B. Your age next birthday? 38 years.

3. A. How much insurance is desired? ($10,000) Ten Thousand Dollars. B. What form of policy is desired Ordinary life. C. To whom payable in case of loss? Nannie S. McWhirter. C. Relationship to the life proposed? Wife. E. To whom is the policy or its cash value to be made payable in case of maturity or surrender within the lifetime of the insured? Myself.

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4. A. Is it desired to pay the premium annually? No. In semi-annual installments? Yes. In quarterly installments? No. (If paid in semi-annual installments, an addition of 2 per cent., and if in quarterly installments, an addition of 3 per cent., will be made to the annual premium stated in the policy.) B. Is it desired to make the annual premium fall due at some other date than that of the policy? Yes. If so, what date? December 1st, 1892.

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5. A. Is there now any insurance on your life? Yes. B. If in this company state the No. of policy and amount? No. 197,244, for $5,000. No.................. for $............ C. If in other companies, state the name of each company or association, and amount insured in each? In the Prov. Savings Co., for $10,000. In the Co., for $. In the Co., for $. In the Co., for . D. How much of above insurance has been granted within one year past? All the same. E. Has any company or association ever *declined* or *postponed* granting or reviving insurance on your life, either for any particular amount, or in any particular form? No. If so, state the name of each company or association, how long

since, and for what cause? F. Has any opinion ever been sought from, or any statement made to, or examination made by, or any consultation ever had with, any person as to whether your life was insurable, except as above mentioned? No. If so, what decision or opinion was then given? G. Is any application or negotiation for insurance upon your life in any company or association now pending? No.

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7. A. In what quantity and how frequently do you use beer, wine or other alcoholic stimulants? Take an average of one drink a day, whiskey mostly. B. To what extent do you use tobacco or other narcotics? Don't smoke at all. C. Describe particularly your past habits in both these respects? Have been moderate in their use. D. Have you been, or are you now engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

7. A. Have you ever changed your residence, or traveled, on account of your health? No. B. When, where, and for how long have you resided out of the United States, or south of the southerly line of Tennessee? Resided in Tennessee prior to 1887. Made a trip to Europe in 1875 for one year. C. Have you ever applied for a pension? No. If so, when, and upon what grounds? Was it granted? D. What is the present state of your health? Good. F. Is there now existing any disease, disorder, infirmity, weakness, or malformation? No.

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8. A. Have you ever had (answer yes or no opposite each) difficult, excessive or scanty urination, or any disease or disorder of the genital or urinary or-

gans? No. Gravel or calculus? No. Colic? No. Yellow fever? No. Delirium tremens? No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No. Affection of spleen? No. Abscess? No. Erysipelas? No. Cancer or any tumor? No. Paralysis? No. Habitual headache? No. Enlarged veins? No. Asthma? No. Chronic diarrhœa? No. Any personal injury? No. Sunstroke? No. Syphilis? No. Scrofula? No. Insanity? No. Distress or vertigo? No. Anuerism? No. Habitual cough? No. Piles? No. Affection of hearing, speech or eyesight? Yes. Gout? No. Spitting of blood? No. Epilepsy? No. Loss of consciousness? No. Bronchitis? No. Shortness of breath? No. Jaundice? No. Any discharge from the ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of the heart? No. Pleurisy? No. Dyspepsia? No. Affection of liver? No. Swelling of the feet, hands or eyelids? No. State how frequently; the date, character, and duration of each, and its effect upon your health? Had inflammation of ear caused by cold in 1889, lasted two weeks, no ill effects on hearing or health. B. Have you had rheumatism? Yes. How many attacks? Two. Duration? Two or three days each. Dates? In 1871 or 1872. Was it inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath, pain in the chest, or palpitation of the heart? No. C. Have you a rupture? No. Is it single or double? Do you wear a truss and agree to do so habitually? D. Have you been successfully vaccinated or had small-pox? Yes. No.

9. A. For what else have you consulted with, or been attended by a Physician or Surgeon during the past ten years? Slight attack of malaria. B. Give dates, duration, and effect on health? Six months ago, no effect on health. C. Name and residence of such Physician or Surgeon? Dr. Hopkins, Fresno. D. Of your usual Physician? Have none.

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10. A. Living?	Age of Each.	Condition of Health of Each.
Paternal grandfather		
Paternal grandmother		
Maternal grandfather		
Maternal grandmother		
Father	65	Good.
Mother	59	Good.
How many brothers living? One.	22	Good.
How many sisters living? None.		

Dead?	Age of Each?	Cause of Death of Each?	Length of Sickness?	Previous health.
Paternal grandfather	85	Old Age.	Short	
Paternal grandmother	94	Old Age.	One Week.	
Maternal grandfather	60	Phthisis.	3 months	
Maternal grandmother	84	Pneumonia	5 days.	
Father				Good.
Mother				Good.
How many brothers dead?....One.	4.	Typhoid fever.	3 wks.	Good.
How many sisters dead?......None				Good.

B. Have any of the above, or your uncles or aunts, ever had cancer, consumption, insanity, apoplexy, paralysis, or heart disease? Yes; maternal grandfather, also uncle on mother's side, died of consumption. C. On which side, and which diseases? Maternal grandfather, uncle mother's side of consumption. Which parent do you resemble? Father.

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11. Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted? No.

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12. Have you reviewed the written answers to the above questions, and are you sure they are correct and true? Yes.

IT IS HEREBY DECLARED AND WARRANTED, that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this application and the several answers, warranties and agreements herein contained, shall be the basis of, a part of the consideration for, and a part of the Contract of Insurance, and that no statement or declaration made to any agent, solicitor, canvasser, examiner, or any other person, and not contained in this Application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and that if there be in any of the answers herein made, any fraud, untruth, evasion or

concealment of facts, then any Policy granted upon this Application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the Policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said Policy for its continuance as paid up insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any State relating to the lapse or forfeiture of policies of life insurance.

Dated at Fresno this 7th day of March, 1892.

Signature of the person or persons for whose benefit the Insurance is to be effected. (Write the names in full.)	Nannie S. McWhirter, by Louis B. McWhirter.
Signature of the person whose life is proposed for insurance. (Write the name in full.)	Louis Bransford McWhirter.

Witness to the signing hereof. J. B. Hays.

Connecticut Mutual Life Ins. Co.,
Hartford, Conn.

Dear Sir—Mr. Hays of this place has just shown me a portion of a letter from your Dr. Shepherd in reference to my statements relative to my examinations, &c.

I was first examined by Dr. Pedlar of Fresno, in the presence of your Mr. Fogg, and afterwards by Dr. Hopkins. So far as I can remember, my statements were about the same on both occasions, and any variance is attributable to a difference in the style of language used by the two physicians. However, I do not think that either examiner quoted me correctly. I never intended to say that I averaged a drink of whiskey a day in one case, or that I used about a glass of wine or beer per day in the other case.

So far as I remember, I stated that I frequently took several drinks per day for a period of a week or month, and that there were frequently months when I did not drink anything. I also stated that I was not considered a hard drinker, and had not been *drunk* during the last five years. I consider myself a man of steady habits and as good a subject for insurance as I ever saw, and I don't want to insure in a company where there is likely to be any question about my family getting the insurance if I die. I have no doubt that upon reading of the reports of both physicians who examined me I could show more than one error, as they frequently put down what they think a man intends, rather than what he says.

Under the circumstances, unless your company can assure me *by special letter* that the *variance of statement in the two examinatinns amount to nothing*, I desire you to direct your Mr. Hays in this city to reject me.

Yours respectfully,

LOUIS B. MCWHIRTER.

FORM OF ADDITIONAL STATEMENT TO PENDING APPLICATION.

Dec. 4, 1891.

To the Secy. of the Conn. Mutual Life Ins. Co.

I herewith submit the corrections and additional statements written below, in and to my application for insurance, dated Nov. 19, 1891.

(Here insert the corrections or additional statements referring to the questions and answers in the application by numbers.)

No. 6. A. Answered "one drink whiskey a day." Take an average of about one a day. Some days take none at all and some days three or four. Have taken whiskey off and on since I was 20 years old. Do not drink to excess nor never have.

No. 7. B. Had one general attack, which lasted off and on through one winter, so far as I can remember, but I do not remember two attacks lasting two or three days each during that time. My recollection is not very clear as to dates, though I know I have not experienced a rheumatic pain in 18 years. I'm inclined to think I had the attack in 1871, possibly it was in 1872.

I agree that the above corrections shall form a part of said application, and subject to the agreements and warranties therein contained in all respects as fully and completely as if the same had been originally set forth in said application.

LOUIS B. MCWHIRTER.

No. 197,244.
Quarterly installment $48.00.

Due the Conn. Mutual Life Ins. Co. in cash at the office at Hartford, Conn., Dec. 18, 1891, the quarterly installment of premium of forty-eight 00-100 dollars, to continue Policy No. 197,-244 on the life of Louis B. McWhirter, in force and binding for three months from that date. Authority is hereby given John B. Hays, Agt., to receive the above-stated amount, and receipt for the said hereon.

Agreement contained in Policy respecting payment of Premiums.

"That this policy shall not be in force and binding on this Company until the Advance Premium hereon shall have been actually paid during the lifetime of the Insured; and that if any subsequent Premium or Installment of Premium, on this Policy be not paid when due, then this policy shall cease and determine and become and be null and void" (except as therein provided), "and that no Premium on this Policy shall be considered as paid unless a receipt shall be given therefor, signed by the President or Secretary of the Company; and such receipt shall be the sole evidence of the authority of any agent to receive any premium on account of this Policy; and that all premiums or other payments on account of this Policy are payable at the office of the Company in Hartford, Conn., and not elsewhere; but for the convenience of the person paying the same, such receipt may be sent to any agent or correspondent of the company for collection; and payment to such agent or correspondent shall be held to have been made at said office of the company."

Edward M. Bunce, Secretary.

Received amount as above this 18th day of Dec., 1891.

By JOHN B. HAYS,
Agent.

No. 197,244.
Quarterly installment $48.00.

Due the Conn. Mutual Life Ins. Co., in cash, at the office at Hartford,Conn.,March 18, 1892, the quarterly installment of premium of Forty-eight 00-100 dollars; to continue Policy No. 197,244 on the life of Louis B. McWhirter in force and binding for three months from that date. Authority is hereby given John B. Hays, Agt., to receive the above-stated amount, and receipt for the said hereon.

Agreement contained in Policy respecting payment of Premiums:

" That this policy shall not be in force and binding on this company until the advance premium hereon shall have been actually paid during the lifetime of the insured, and that if any subsequent premium or installment of premium, on this policy be not paid when due, then this policy shall cease and determine and become and be null and void" (except as therein provided) "and that no premium on this policy shall be considered as paid unless a receipt shall be given therefor, signed by the President or Secretary of the Company; and such receipt shall be the sole evidence of the authority of any agent to receive any premium on account of this Policy; and that all premiums or other payments on account of this Policy are payable at the office of the Company in Hartford, Conn., and not

elsewhere; but for the convenience of the person paying the same, such receipt may be sent to any agent or correspondent of the Company for collection; and payment to such agent or correspondent shall be held to have been made at said office of the Company."

EDWARD M. BUNCE,
Secretary.

Received amount as above this 18 day of March, 1892.

By JOHN B. HAYS,
Agent.

No. 197,244.
Quarterly installment $48.00

Due the Conn. Mutual Life Ins. Co., in cash, at the office at Hartford, Conn., June 18, 1892, the quarterly installment of premium of Forty-eight 00–100 Dollars, to continue Policy No. 197,244 on the life of Louis B. McWhirter in force and binding for three months from that date. Authority is hereby given John B. Hays, Agt., to receive the above-stated amount, and receipt for the said hereon.

Agreement contained in Policy respecting payment of Premiums:

"That this Policy shall not be in force and binding on this Company until the Advance Premium hereon shall have been actually paid during the lifetime of the Insured; and that if any subsequent Premium or Installment of Premium, on the Policy be not paid when due, then this Policy shall cease and determine and become and be null and void" (except as therein provided), "and that no pre-

mium on this Policy shall be considered as paid unless a receipt shall be given therefor, signed by the President and Secretary of the Company; and such receipt shall be the sole evidence of the authority of any agent to receive any premium on account of this Policy; and that all premiums or other payments on account of this policy are payable at the office of the Company in Hartford, Conn., and not elsewhere; but for the convenience of the person paying the same, such receipt may be sent to any agent or correspondent of the Company for collection; and payment to such agent or correspondent shall be held to have been made at said office of the Company."

EDWARD M. BUNCE,
Secretary.

Received amount as above this 18th day of June, 1892.

By JOHN B. HAYS,
Agent.

Mr. Thornton—Outside of the Connecticut Mutual Life Insurance Company, the deceased was insured in other companies to the extent of $45,000, which has been paid, and that he was insured for $10,000 in the Northwestern Life Insurance Company of Milwaukee, Wis.

Mr. Campbell—We agree that the insurance was all taken out between March, 1892, and June, 1892.

Mr. Thornton—Subject to correction by the production of exact dates. He had another policy for $20,000 in the Providence Savings and Life Association of the United States; another policy for $5,000 in the Union

Mutual Life Insurance Company of Maine; another policy for $10,000 in the N. Y. Life Insurance Company; and two other policies in the Connecticut Mutual Life Insurance Company, which are the subject of this action.

Mr. Budd—We offer in evidence a mortgage from John C. Rorden of Fresno, Cal., to Miss Nannie Blasingame, dated April 2, 1888, for $150 at ten per cent per annum, on lots No. 22 and 23 in Block No. 2, of Griffith's Addition to the town of Fresno, paid according to the record, by acknowledgment of N. S. Blasingame-McWhirter, on the 28th day of April, 1892.

It will be admitted that the date of the marriage between plaintiff and deceased was the 15th of February, 1889.

Mr. Thornton—Call it the 14th of February, 1889.

Mr. Budd—We offer in evidence a mortgage dated Sept. 28, 1888, from J. A. Lane to Nannie S. Blasingame on three lots in Block No. 339, in the city of Fresno, for $1,000, which was paid on the 3rd of April, 1889. There is a note attached, bearing interest at ten per cent per annum.

Mr. Campbell—Let us get these exhibits marked. The $5,000 policy, together with the application attached, will be Defendant's Exhibit No. 1. The $10,000 policy with the application attached will be Defendant's Exhibit No. 2. The first mortgage of April 28, 1888, will be Defendant's Exhibit No. 3. The notes and mortgage of J. A. Lane to Nannie S. Blasingame of September 28th, 1888, will be Defendant's Exhibit No. 4.

Mr. Budd—We now offer in evidence, if the Court please, a mortgage from J. Ferber and Annie Ferber, his wife, to Miss Nannie S. Blasingame, dated the 17th of March, for $400, payable one year after date, with interest at 1¼ per cent. per month, compounding every three months, together with the endorsement of the satisfaction of said mortgage and payment thereof to N. S. McWhirter, nee Blasingame, on March 2, 1889. That is on lots 8 and 9 in Block 26 of the City of Fresno.

Admitted in evidence and marked "Defendant's Exhibit No. 5."

Mr. Budd—We offer in evidence, if the Court please, a deed from Nina S. Blasingame to Mary J. Blasingame of the 12th of February, 1889, for lots 8, 9, 10 and 11, in Block 3 of the Riverdale Addition to the town of Fresno, for a recited consideration of $850. This is dated two days before the marriage.

(Admitted in evidence, and marked Defendant's Exhibit No. 6).

We now offer in evidence a mortgage given by Nina S. Blasingame of the County of Fresno, to the Farmers' Bank of Fresno. The note is dated December 18th, 1889, but the acknowledgment is dated the 19th of December, 1889, for $600, secured by portions of Block No. 96 in the City of Fresno, payable one year after date, with interest at one per cent. per month from date, which mortgage was released and paid to the bank on the 27th of October, 1892.

Admitted in evidence, and marked "Exhibit No. 7."

Mr. Budd—We now offer in evidence, if the Court please, a mortgage by N. S. McWhirter to the Fresno

Loan and Savings Bank on lots Nos. 25 and 26 in block 78 in the town of Fresno for the sum of $400. The date of the note is July 3, 1891, with interest at one per cent. per month, compounding semi-annually, which mortgage was released on the 6th of October, 1893.

Admitted in evidence, and marked "Exhibit No. 8."

Mr. Budd—We now offer in evidence a mortgage dated May 15th, 1889, by N. S. McWhirter, formerly Blasingame, to the Fresno Loan and Savings Bank, on lots 29, 30, 31 and 32 in Block 109 in the town of Fresno, for the sum of $1,500, payable six months after date at the rate of one per cent. per annum, compounding semi-annually, released October 6th, 1893.

Admitted in evidence, and marked "Defendant's Exhibit No. 9."

Admitted by counsel that the homestead of Mr. and Mrs. McWhirter was lots 20, 21 and 22 in Block 339.

Mr. Budd—We now offer a mortgage of the 1st of May, 1892, executed by Nannie S. McWhirter and Louis B. McWhirter to the Fresno Loan and Savings Bank on their home—lots 20, 21 and 22 in Block 339, for $1,000, payable six months after date at one per cent per month, released October 6th, 1893.

Admitted in evidence, and marked "Defendant's Exhibit No. 10."

Mr. Budd—We now offer in evidence a deed from Nannie S. McWhirter, formerly Blasingame, wife of L. B. McWhirter, dated May 24th, 1889, to R. Hedinger, for the northeast quarter of Section 15, Township 12 South, Range 18 East, M. D. B. M.

Admitted in evidence, and marked "Defendant's Exhibit 11."

Mr. Budd—We offer in evidence a deed from N. S. Blasingame to W. D. Tupper of the town of Fresno of lots 5 and 6 in Block 96 for the recited consideration of one dollar.

(Admitted in evidence and marked "Defendant's Exhibit 12."

Mr. Budd—We offer a collateral deed from Miss N. S. Blasingame of the 28th of September, 1888, to J. A. Lane, for portions of Block 339, being lots 17, 18 and 19 of the block, for a recited consideration of ten dollars. That is the date of the mortgage.

The Court—This becomes quite a distance prior to the marriage, and I think you had better reserve that paper until you draw out the different facts in relation to the payment of that money. As yet it does not appear that this bears upon the question.

Mr. Campbell—We note an exception, if the Court please.

Mr. Budd—We offer a mortgage from W. D. Tupper of date the 5th of September, 1887, to Nina S. Blasingame for $775.00 on lots 5, 6, 7 and 8 in Block 96, and lots 13, 14 and 15 in Block 98, in the city of Fresno, released as to lots 13, 14 and 15 in Block 98, on the 13th of March, 1888, and released in full on February 1st, 1889.

The Court—The paper may be received to show money paid on February 1st, 1889.

Admitted in evidence and marked "Defendant's Exhibit 13."

W. W. Phillips, a witness called on behalf of the defendant, testified as follows:

Have resided in Fresno about twenty-three years, and knew Louis B. McWhirter ever since he resided in Fresno. I think he came there to live in 1888. For the last six years I have been Vice-President and Manager of the Farmers' Bank at Fresno.

Prior to Mr. McWhirter's marriage in February of 1889, we were living at the same hotel, and became very well acquainted. He came to me a short time before he was married and asked me to loan him $250 to pay his wedding expenses, which I loaned him, and the money was returned to me sometime in December of the same year.

I negotiated a loan with Mr. McWhirter of $600, signed by his wife, on some property that she owned, on the 18th of December, 1889. It was a short time after this loan was made that he paid me the $250. I don't know whether the $250 was paid me out of the identical money that was loaned him, but in looking up my individual accounts with the bank I found I was credited with $250 on the 30th of December, 1889. It seems to me that the mortgage hung fire for several days in the examination of papers, and I am not sure just when that money was paid to him.

That mortgage for $600 was paid on October 27th, 1892, after the death of McWhirter.

At the time that Mr. McWhirter was in the mountains, in the summer of 1892, I wrote him that the loan was long past due and that we desired the money; that it must be paid, or we would have to start a suit of foreclosure. This was during the summer vacation

which McWhirter took just before his death. I did not see Mr. McWhirter when he came back.

We also had some collections against Mr. McWhirter for some insurance companies—what were termed renewal receipts of the Providence Savings and Life Insurance Association. They were in the hands of our collector, and he had sent notices out, and Mr. McWhirter came in one day in answer to them, and asked the clerk who had charge of these collections whether, if he came in after banking hours on the day that these collections were due, the clerk would accept the money, and my recollcction is that the clerk came to me and asked me whether he should give him after banking hours, and I told him yes. He did not pay it prior to his death.

At the time he died the renewal receipts were in the hands of the collector of the bank.

I was well acquainted with the people of Fresno and their financial standing at the time that Mr. McWhirter died. From the month of March, 1892, up to the time of his death, he had a very limited credit. I have a general idea as to what his financial standing was. He was considered an honest, upright gentleman, but he was a man of no property that I knew of. His credit for current bills made by himself as a rule was very good; that is, for current bills. He had no other credit financially that I am aware of.

CROSS-EXAMINATION.

The renewal receipts were not due at the time of Mr. McWhirter's death. They became due a few days later—one on the 2d of September following and one

on the 25th of September. I think the amount of these renewal receipts was about $86.00 a piece, something like that. He had simply been notified that they were in the bank and the time they were due.

McWhirter borrowed the $250 from me about a week before his marriage. He said, "Phillips, I want to get married in about a week, and am a little short of funds. I am expecting some from the East, and would like to borrow $250." I thought he made the application to the bank, and said, "Mac, I will have to require some security if you ask a loan from the bank." "No, no," he said; "I simply ask it of you individually as a personal favor to me, from your own funds."

That was an individual transaction. I loaned him my own money, and did not even take a note for the money. It was an accommodation matter just pending until he could get some money from the East.

Mr. McWhirter drew several drafts, I think, on his father, at different times, and I never remember of any that were returned.

RE-DIRECT EXAMINATION.

It is so long ago that I cannot remember upon whom the drafts were drawn. They were usually very small amounts, $25 or $50. I don't remember any larger amounts. The drafts were drawn soon after his arrival at Fresno, and I think all prior to the time of his marriage.

RE-CROSS EXAMINATION.

My recollection is that the drafts were usually small, and I cashed them without any question because of their size. I have only an indistinct recollection as to

the amount and the time, because it has passed out of my mind. It is a small matter.

He did not offer to give me any draft at the time he borrowed the $250 from me.

Edward S. Valentine, a witness, sworn on behalf of the defense, testified as follows:

I am a life insurance agent, and resided in Fresno from October, 1889, to February, 1892.

During my residence in Fresno I became acquainted with Louis B. McWhirter, and in the months of May, June and July, 1892, I was representing the Mutual Life Insurance Company of New York. About that time I met Mr. McWhirter on the street, and he recalled a promise he had made me if he had any more insurance he would patronize me. He called that to my mind, for which I thanked him, and he asked me to give him figures on a 20 payment life plan for $20,000. As near as I can remember this was in the month of May, 1892. I told him the rate would be $735 or $736 on $20,000 per annum, on the 20 payment life plan. He preferred that plan of insurance. Then he proposed that I take his notes in payment of the premium, due in 7 or 8 months, or "after the election" as he termed it. I believe that he proposed to give two notes, one due possibly in four months and the other in eight months. I was unable to accept the note at that time, and told him I would have to get money enough to pay the net premium, and that I would find out if I could raise the money on his notes, and would meet him the next day. The next day I met him and told him I could probably arrange the matter if I could have his wife's

signature on the notes. That seemed to displease him very much, and he told me he was responsible for his own actions, and did not propose to ask anyone to endorse his paper, and to let the matter drop.

I had gone to Mr. Richmond, the cashier of the Farmers' Bank, and asked him if he would advance the net premium, which at that time was about 50 per cent. of the first annual premium on Mr. McWhirter's notes. Mr. Richmond shook his head and referred me to Mr. Phillips. I afterward saw Mr. Phillips, who said he was sorry that he could not handle the notes, and that he thought it would be doubtful if I could negotiate them, especially on such a long time. Mr. Phillips said if I could get his mother-in-law to endorse them he would get me the face value of them. I was endeavoring to hypothecate the notes for fifty per cent. of their face value, and was unable to do so, and the insurance transaction fell through.

Cross Examination.

The first conversation I had with Mr. McWhirter about taking life insurance was, I think, about the early part of 1891. It was soon after taking a policy with the Connecticut Mutual, and he consulted me about the Company. I told him it was a first-class company, stood well, and that he had a good contract. He seemed to apologize for not taking it with me, because he had promised to take insurance with my company, but that his business relations were such that he must take it with that company. That if at any future time he should take any insurance, he would be very glad to take it with me.

I think it was before the State Democratic Convention was held in Fresno that he first spoke to me of the amount and the kind of a policy he wished to take out in my company. We had two or three conversations about this.

I did not know the amount of insurance McWhirter was carrying at that time. It is necessary in making out an application for insurance in our company to state what insurance is already on the life of the applicant.

RE-DIRECT EXAMINATION.

I did not get so far in this insurance matter with McWhirter as to an application.

Dr. A. J. Pedlar, a witness called on behalf of the defense, testified as follows:

I have resided in Fresno for the past 14 years, and am a physician and surgeon. I was a friend and the family physician of Louis B. McWhirter, and was called in to attend him at the time of his death. I reached his residence at about 20 minutes past three A. M., and found him lying on a sofa in his dining-room in an unconscious condition and breathing very laboredly. I found a gunshot wound of the left breast, about one and a half inches to the right of the nipple proper. He still had on his night shirt and his under-shirt. The former was of some white material and was considerably powder-burned about the margin of the wound, the point of entrance of the bullet, and also some of the powder-burn on the night shirt underneath. There was some blood—a very small quantity of blood, oozing from the wound, and the shirt had also become somewhat bloody, particularly

on the lower side of the wound. The quantity of blood oozing from there was very slight.

The bullet struck the lower border of the fourth rib from the top, its course was downward and almost directly backward. I would not be positive about that, but I think a little bit toward the median line. I took the ball from just below the point of the shoulder-blade on the back of the left side. The bullet was lodged in the muscles of the back and I cut it out. The angle that the ball took was between twenty and thirty degrees, I should think, and the ball traveled I should think between 9 and 9½ inches probably, and probably 2 inches downward.

That garment which you show me has every appearance of what he had on at that time, and the shirt is in about the same condition so far as the location of the gunshot wound is concerned, I think. That tear or cut in the shirt has been done subsequently. The pronounced powder mark that I allude to is about the size of a dollar. There were some grains, if I recollect right, spattered outside there, but the distinct mark was about the size of a dollar.

That is, I think, the undershirt that he had at that time, and it is in about the same condition now.

Night shirt and undershirt offered and admitted in evidence, and admitted by the plaintiff to be the identical garments worn by the deceased at the time of his death.

The Witness—I found no other wounds on his body, nor scratches, discolorations or abrasions. The bullet wounded the left lung and the heart, striking the edge of that rib, and then going through nothing but soft organs.

As near as I could say that which you show me is the bullet which I took from the body.

(Bullet offered and admitted in evidence, and marked Defendant's Exhibit 16.)

I think the bullet is in the same condition that it was when I took it from the body.

Cross Examination.

I knew Louis B. McWhirter I think about five years. His height was five feet nine inches, and he weighed about 165 pounds. He was as nearly a typically developed man as I ever made an autopsy on. He had no surplus fat on him, but was a well developed and well nourished man. His chest was full, well formed, and well developed.

Q. What would have been your estimate or opinion of his personal strength?

Mr. Campbell—I object to that, if your honor please; I don't think a physician could tell what the strength of a man was.

The Court—That is pertinent what his strength was. I suppose this witness would be competent to tell what his muscular development was. Answer the question.

Mr. Campbell—We take an exception.

The Witness—He was a man of more than ordinary strength I should judge. On the morning of the shooting I saw two pistols exhibited at the McWhirter house, which were in all respects similar to these which you show me.

I do not know whether McWhirter was left or right-handed with a pistol.

My house is about 900 yards from McWhirter's, and I don't think it took me over six or seven minutes

from the time I was awakened to get to his house. When I arrived there the body was on the sofa in the dining-room, and I remained until he died, which I think was about twelve minutes after I got there. He was unable to speak, and I think he was incapable of recognizing anybody. There was a deep-seated and regular moan accompanying almost each breath. There were several people in the house when I got there.

After McWhirter's death I had his body conveyed from the sitting-room into the parlor, and remained in the house until after sunrise—an hour or an hour and a half after my arrival—and then I went home.

Went out in the back yard before I left for home and looked at the premises.

I have had such an experience in the treatmeat of gunshot wounds as a practice of fourteen years in Fresno and two years in Truckee would give a man.

Such a time has elapsed since the staining of this shirt that it would be difficult to indicate anything more than the very deepest stain. As far as the deepest stain is concerned — about the size of a silver dollar would give that—my recollection is, however, that the blood and powder were intermingled very extensively together in this area, and it is impossible to indicate anything beyond the deeper staining. I cannot say from the present indications whether any portion of it is caused by powder-burning or grains of powder. It is only from my recollection that I say so. I believe a portion of it was caused by powder. The difference between discolorations made by blood and made by powder can be de-

termined very readily when freshly made by the difference in the color, and also by the dusty or gritting feeling of the powder. A stain made from blood on a fabric of this kind, the moistening element of the blood would show and be disposed to spread beyond the area that had received the clot. The powder would not not be so apt to show that. It would be a more distinct and well-defined stain.

Most of the blood expelled from the wound was arterial blood. The veinous blood is the darker in color. The external hemorrhage from this wound was very slight; internally very great and general. The hole was as clean a hole as you often see from a bullet from a gunshot wound.

I found no fragments or any pieces of the fiber of either of these garments in tracing the course of the wound, and if there was any there, I think my examination would have revealed it.

Re-Direct Examination

The immediate effect of such a wound as that inflicted upon McWhirter would be very nearly synonymous with a profound collapse, and would produce paralysis. All feeling and intelligence and voluntary motion would almost cease. His ability to express feeling would cease, and all intelligence is suspended, as well as the operation of the mind. It would produce such a change or loss of co-ordination of movement that he would be apt to fall, if not immediately, almost immediately.

When I got to the house the deep powder stain that I outlined this morning to the extent of about a dol-

lar was very perceptible, dark and black, very much as you see it now. It is so deep there that it has not faded very much, the powder stain having gone right through the cloth, and had also stained the undershirt to some extent. It was distinct and black and shaded off like powder burns usually do.

When I arrived there there was no coagulated blood spread over the garment, only what had coagulated in the meshes of the garment. When exposed to the air blood will coagulate very rapidly. There were some extra grains of powder showing outside of the deeper mark.

RE-CROSS EXAMINATION.

In a person shot as McWhirter was there could be convulsive action and nervous action without intelligence. I saw a man shot through the heart and he staggered about from 6 to 8 feet from where he was shot.

RE-DIRECT EXAMINATION.

A person shot as McWhirter was could not afterwards have fired two shots intelligently.

RE-CROSS EXAMINATION.

Mr. McWhirter's disposition was a cheerful one whenever I had any conversations with him.

Mrs. Nannie S. McWhirter, called for the defense testified as follows:

DIRECT EXAMINATION.

To Mr. Campbell—Q. Did you ever have given to you, or find after your husband's death, a letter written by him of instructions to you? A. I did.

Q. Where is that letter?

A. I don't know, sir. I put it in my trunk when I went East after my husband's death, and it remained there, I suppose, until I went North, in March, I think it was. I was very ill, and when I returned to Nashville the carpenters had taken charge of my uncle's house, where we were boarding, and one trunk I left in the house, and it was put in a trunk-room until I went to Franklin, Kentucky, where I remained one month. Then I returned to California, some time the latter part of May—I don't remember the date—and during the Heath trial I looked for that letter, thinking it might be of some use, but I could not find it.

Have not seen the letter since before I went to Oregon. It was originally brought to me with some other papers, some of my mother's, and others that were brought from my husband's bank box by Mr. Thompson or my brother Lee, I have forgotten which.

CROSS-EXAMINATION.

To Mr. Thornton—The letter was dated the 25th of June, I think, 1892.

A. U. Warnekros, a witness produced on behalf of the defense, testified as follows:

I have resided in Fresno for the past eight years, and am a gunsmith.

I knew Mr. McWhirter very well. He dealt with me at times, and in 1891 I sold to him a 41-caliber Colt's new navy pistol, one that the chamber throws to the side for the purpose of ejecting. It was a pistol similar to the one which you show me, marked People's Exhibit No. 6, People vs. Heath.

The other pistol that you hand me, marked Exhibit No. 5, People vs. Heath, with a triangle on one side, and "H" on the other, and an obliteration of a number at the butt, and the obliteration of the number on the trigger guard, but not in front of the trigger guard is a 41-caliber pistol, and both the pistols are made by the same company, and carry the same size cartridge.

Exhibit No. 16, the bullet which came from the body, is as near as I can judge, a 41-caliber ball.

I cannot tell what caliber that mashed bullet is.

This bullet which you show me is a 32 short, rim fire.

This bullet found in Clark's yard or in the outhouse is of 41-caliber, and the bullets found at the base of the fence of the chicken yard are 32-caliber.

I have sold Mr. Whirter 32-caliber bullets; Mr. McWhirter had a thirty-two caliber rifle on the ranch or in the house. I sold him a box of 32-caliber bullets before he went to the mountains. They were 32 short.

The three empty cartridges and the three cartridges from the old pistol and from the new were all 41 short bullets, and the bullet found in the body was also a 41 short bullet.

I sold and delivered this pistol to Mr. McWhirter on or about March 27th, 1891, for $16.50.

CROSS-EXAMINATION.

The pistol I sold Mr. McWhirter on March 17th, 1891, is the only one I ever sold him. He was in the habit of dealing with me in the purchase of firearms and ammunition, and I knew him very well. He

also purchased from me a double-barreled shotgun several years ago, I think. I never heard of his buying from any one else. He came to my establishment for the purpose of laying in a supply of ammunition and firearms prior to his going to Pine Ridge on the third of July. At that time, as near as I can recollect, he bought about 200 of shotgun cartridges, some 32 cartridges and one box of 41 long for his pistol.

Mr. Budd—We now offer in evidence, if the Court please, all the statements of the plaintiff, the evidence of the plaintiff herein on the coroner's inquest held in Fresno September 7, 8 and 10th, 1892.

Objected to, and decision reserved by the Court.

Thomas Rhodes, a witness sworn on behalf of the defense, testified as follows:

I reside in Fresno, and am acquainted with Mrs. McWhirter, and knew her husband in his lifetime. At the time of Mr. McWhirter's death I was working for a man named Clarke, as gardener.

(Referring to diagram)—This is supposed to be L street, this Calaveras street, and this the alley between the McWhirter residence and Mr. Clark's. This is McWhirter's house, this the Southworth house, north of it. South directly is Dolph Lane's place, and south of that is another place owned by him. He owns the two on the corner. This is Mr. Clark's residence. I slept in this little bedroom off from the pine woodshed adjoining the north line of the Clarke lot. The mill is correctly represented. This is McWhirter's house facing to the west. On the south side of it is a bay window which looks out on the south, there being windows on each side.

Q. That is, this bay window is a square window, with windows to the east, windows to the west and windows to the south?

Mr. Thornton—That is an admitted fact.

The Witness—This is the window in the bedroom of McWhirter (showing on diagram). South of that there is a walk around the house from the front door and going into the office, and south of that walk there is a grass plat. I think the distance from the bay window to the fence on the south line of McWhirter's premises is about 15 or 20 feet. The fence south of McWhirter's place is a close board fence about four feet high, I should judge, between Lane's and McWhirter's, and it is whitewashed. That is the office McWhirter had in the back yard (showing.) From the bathroom to the corner of McWhirter's office is 35 feet six inches, and the depth of the office is 16 feet 3 inches and the width 14 feet 3 inches. This represents the water closet in that corner and the lattice work. It is 14 feet 6 inches long, and the width of the whole here is 7 feet 9 inches, and it is thirty inches from the water-closet to the lattice work on the west and fourteen inches on the east to the back fence. It is four feet $3\frac{1}{4}$ inches wide by four feet $3\frac{1}{4}$ inches square. Mr. McWhirter kept a horse in this shed at one time, I believe, and that is a barn. This is a high lath fence and in here they used to have a chicken place. Here there is a fence with a base board to it—a foot board, and on top of that are the uprights.

On the night McWhirter was killed I was sleeping in this bedroom. At half past two of that night I got up to shut off the windmill. I heard the water over-

flowing the tank, so I got up and went and pulled down the lever and stopped it from pumping, and went back to my room and lit a match and looked at the clock and it was half-past two. I heard the shooting. The first impression that came to my mind was that there was a horse kicking. The shooting went kind of quick. There seemed to be a stoppage before the shooting ended—just so you could notice it. Then I heard a woman's voice screaming. I rushed from my room, not stopping to dress myself, and rushed to this fence in a straight line. It is about 7 or 8 feet high—it is the west Clark fence. I got up on the fence, the screaming continuing all this time, and saw Mrs. McWhirter and Mr. McWhirter lying down. I found out it was he afterwards. I saw a body lying there and Mrs. McWhirter was calling for help, for some one to come, "Murder," or something that way. I spoke to her and asked her what was the trouble. She put up her hands and said, "O, Mr. Clark, come over here." She took me to be Mr. Clark, the man I worked for. I ran back to my room and dressed myself and come over. When I got there there was no one present but Mrs. McWhirter and her husband, who was lying down. I have an idea that Mrs. McWhirter screamed before the last shot was over. It strikes me that way. I know there was no shooting after I left my room. I was in my room when the shooting ceased.

I did not hear any voices or loud talking or other noises in McWhirter's backyard. He helloed "O," and that was the only sound I heard. I did not hear anybody running away from there or any other

sounds. I then went back and dressed and came over to Mrs. McWhirter. The body was lying 15 or 16 feet from the fence in west on the little path, about here. It was just about west of the gate. It lay over here diagonally towards the house from the post. His head was towards his back fence—toward the east and his feet was towards the west, to the front fence. His head lay toward the alley and his feet toward the house.

When I got over there on the second occasion I spoke to them and got down and raised his head up a little, and asked him where he was hurt. I thought he was talking, but instead of that he was groaning. I could feel him trembling, and thought he was badly hurt. Then I told Mrs. McWhirter to go for the doctor. She asked me to get some of the neighbors in, and I started for the doctor then. In going for the doctor, I continued on this path where I left him lying and come south of the house on the regular path and out onto L street. The next person I saw after seeing Mr. and Mrs. McWhirter was the young man who came to Dr. Pedlar's door.

I walked back to the house, and coming back I met John Muller and a man named Stewart Reed.

He asked me what all the shooting was about and I told him that it was McWhirter that was shot. The three of us got back together, and when I got back there was quite a crowd around the place. When we were walking toward the house we saw a crowd coming in and out the front of the house, going up the front stairs and into the back room, and there was a crowd of men in the back part of the house. As I

was coming down I could see lanterns. I did not go there. I went into the house to see how he was hurt.

The gate leading from McWhirter's place to the back alley is about as high as the fence, close boarded, I think, I am not sure. There is a sort of latch on it, and coming in or out of McWhirter's back yard you simply have to touch a latch, it being neither bolted or locked in any manner.

When I stooped down to speak to McWhirter that night I noticed two boards off the fence. They were right close to and north of the water closet, about there (showing).

The trees at Mr. McWhirter's place were inside of his fence, and there were no trees out in the alley at all.

Clark's fence was a good deal higher than Mrs. McWhirter's fence, Clark's fence being all of seven or eight feet high, and in looking over Clark's fence that morning I ran up a pile of wood that lay alongside the fence, and looked over and saw where they were. I found a bullet in the fence near the water closet and there was two higher up and further north of the fence.

Q. Was the board or the place where the bullet was in the fence north or south of the opening where these boards were off? A. The lower one?

Q. Yes.

A. I am not quite sure. I know the other two high ones were north.

Q. But you can't remember whether that was north or otherwise?

A. No, sir; it was right close up. I can't tell now whether it went south or north. It was down. I did not notice whether the fence was powder-marked or otherwise. One bullet was up in the corner of the water closet, that was far up, and another bullet hole that went through the water closet. It went right straight through, about the height where a man would stand and shoot right through. If a man stood where McWhirter had fell it is about just where those balls would go. I think the ball went through here and into the Clark fence.

Photograph offered and admitted in evidence, and marked "Defendant's Exhibit 21."

The Witness—(Exhibiting photograph to the Jury). This is where the Clark windmill was, this dark shading here, the fence, that is the back fence of McWhirter's yard, where it is lighter that is Mr. Clark's, about three feet higher, some like that, it is 19 or 20 feet between the alley-way. Here is represented a post or clothes line. You can see the roof of the water closet, and that is the screen that hides the water closet from the house. Here is where the boards are off, and the slats are nailed across, the boards being off. Here is the bullet hole that was shot down. That kind of dark hole represents the water closet, that went up in the eaves of the roof. And here are the other two in the white fence.

When I come back from Dr. Pedlar's there was all of twelve people there. They were looking around and examining bullet-holes and talking. They were going around there promiscuously, examining these different objects and different places.

I cannot tell how many shots I heard. I swore at the coroner's inquest there were all the way from five to eight. I could not tell how many shots were fired. I never could. There was an interval between the shots, just noticeable. The shooting was very quick. and there was a stoppage once or twice, it seemed to me, and it strikes me a woman screamed before the shooting ended. I could not tell whether she screamed in the house or out of doors.

CROSS-EXAMINATION.

My leg has been broken ever since I was eight years of age, but I make my living by being on my feet all day. I cannot be called an active man.

The first impression when I awoke was that of a horse kicking, but just as soon as I got up I knew it was shooting. The second shot satisfied me that it was a shot. The first shot I thought was a horse kicking.

When I first ran out of the house I only had my night clothes on, and then I went back and put on my pantaloons, coat and shoes. The second time I connot recollect whether I went over the fence or went around the gate by the windmill. When I went to surmount the woodpile I missed my footing and fell on my knees, and then came up and looked over the fence, went back to my bedroom, and put on my clothes.

From the time I awoke until I reached Mrs. McWhirter's side by her husband, it was all of three minutes.

From this water-closet to the end of the alley-way in Calaveras street is seventy-five feet. In other words a person would only have to go that distance to get to Calaveras street.

I was in some degree of mental and physical excitement at that time, but I was not bewildered at all. It never entered my head to look in either direction for any supposed assailants. My whole attention was concentrated where the woman was screaming.

I did not pay any attention to the separate reports of the discharges which I heard in regard to their degrees of loudness. All I noticed was that there was a stoppage. They were not fired right quick, one after another. There was a stoppage between. There might have been a couple of shots fired one after the other. Then a couple of more, probably three.

Q. And then the final shots, if there were any more?

A. I could not say. The first shot sounded to me when I woke up, the shot I took to be a horse kicking. That might be on account of my sleep, just waking up, that sounded different from the rest. The way I satisfied my own mind it might have been fired by a man in the water-closet.

Q. It would have a hollow sound like that of a blow struck upon a drum?

A. It seemed different from the others. That might be on account of my sleep. I could not say.

Before Mrs. McWhirter screamed I heard the hello like a man in pain. In my mind it seems to me

that Mrs. McWhirter screamed before the last shot and the hello was before her scream.

The weather on that night was cool for Fresno.

RE-DIRECT EXAMINATION.

When I was awakened by the shooting I ran to the fence as fast as I could, and I can run and walk pretty fast, making my living by being on my feet all the time.

I got up, and I know when I got outside of my door there was no more shooting. The shooting was going on while I was preparing to go out. When I got outside there was no shooting.

From the time I left my door to the time I got to the fence I heard no noise, or talk, or scuffling, or nothing except Mrs. McWhirter screaming.

RE-CROSS-EXAMINATION.

Mrs. McWhirter's screaming was apparently at the top of her lungs, and she was making all the noise I think a woman capable of under the circumstances.

There were no precautions taken by any person to close this alley at either end up to and after daylight of that morning. I stayed around the premises that morning probably until half-past five or six o'clock.

(Agreed between counsel that daybreak occurred at 5:20 A. M.)

Every person who desired entered and walked in upon those premises from either end of this alley without any interference from anybody. Before I left the premises there were probably from 12 to 30 persons. Certainly not less than 12 and probably 30.

RE-DIRECT-EXAMINATION.

From the very moment I got there people were coming and going in the streets and tramping up and down the alley and all over the yard.

F. F. Babcock, a witness sworn on behalf of the defendant, testified as follows:

I live in San Francisco, and am employed by Mr. C. J. Stillwell. On the night of the killing of McWhirter I was a police officer of the City of Fresno, and had been such for a year previous.

At the time of the shooting I was on the corner of G and Tulare streets, Chinatown.

Q. What drew your attention, Mr. Babcock?

A. Hearing some shots.

Q. How many?

A. Five or six. I was on the street at the time, in Chinatown, outside the reservation. The McWhirter house is in Block 339, which is on L and Calaveras streets. I was standing right at the door of the saloon that was on the corner of Tulare and G streets. It was a calm, still night. I say I heard five or six shots, my attention as a police officer being called to them. I started to run in what I thought was the direction of the shots. On the corner of Merced and J street I met Pink Farley, the night watchman. I also met Mr. Davidson, the gentleman who lives right opposite Mrs. McWhirter's. He was after the doctor at the time and I went with him. It took me about 7 or 8 minutes to get to Mr. McWhirter's house including stops and everything. When I got there the first man I noticed was a man named Godchaux, of the Kutner-

Goldstein Co., and there were several others in the room that I knew by sight.

I went into the house as soon as I got there and was in there a couple of minutes.

There were several people in the house when I got there and the body had been taken in. I did not see the doctor there. I could not say who was there. Mrs. McWhirter was in the room. When I went into the room Mr. Godchaux sat right at the door and Mr. McWhirter was laying on a lounge and Mrs. McWhirter was standing directly over him.

When I went into the yard Officer Welch, George Rupert and a lame man named Rhodes were there and Mr. A. M. Clark, We examined around the yard, I could not say how long, and examined where Mr. McWhirter was found, and Officer Welsh found a revolver. When I came out of the house I went into the yard past the office. The revolver was the first thing found, which was picked up about in here (showing) near that post. It might have been $3\frac{1}{2}$ feet back from the post towards the house where the revolver was picked up. I noticed the mark of the body.

Q. How far was it from where the body—

A. Where Mr. McWhirter is supposed to have lain on the ground, the pistol was lying at his right hand —to the south. The body lay with his feet toward the post and the head toward the house and a little to the north. The pistol was found alongside of the mark of the body.

The distance from the alley fence to where the pistol was about 12 or 15 feet, perhaps about three feet south of the gate, as near as I can remember, near

the post, between the post and the office, and three feet to the west of that brace. The pistol marked "Exhibit 6," People vs. Heath, is the pistol found alongside of the body.

We then walked around the yard here, and walked over towards the back yard fence, and found two clubs and another revolver. Those clubs marked Ex. 7 and 8, People vs. Heath, are the clubs we found.

Q. Are they in the same condition?

A. This one here has the rope off and the tack out of it—out of the crack there. This one with the rope on it and the tack out of it was lying between a tree and the opening in the fence, but out away from the fence. The other club was standing against the fence near the opening in the fence. That one did not have anything on it. It was right near the post that is shown there near the tree.

It was set up right alongside of that post. I also found the two boards that had been knocked off the fence set up against the fence in the alley. Those are the two boards which you show me. They were set up against the fence something like that, south of the opening. I left them there, and never examined them at all.

In the same vicinity I found another revolver. That is the revolver. I took it home with me. It was in the same condition at the time I found it as it is now, with the exception of being loaded. The numbers had been taken off in two places. That pistol was lying on the ground in the same locality as the club that had the rope on.

At the time we found the club and the revolver, Officers Welch and Rupert were with me, and one or the other of them kicked a rag that was there away. I afterwards picked it up. It was lying against the fence when I picked it up.

I found a piece of rope of the character you show me around the club, in the form of a loop. The rope was held in place by a tack so that it would not slip. The tack was right through the rope into the wood. A little before nine I turned the things over to Sheriff Hensley.

I did not notice whether the nail in the club was rust-eaten or not.

That is the mask I found. It is the rag that I said had been kicked to one side by Officer Rupert or Welch, and which I afterward picked up. It was in the same condition as now as to being torn. When I first found it, it had been lying nearer the clubs. I think it was kicked away. I could not say the exact position that it was in, because they kicked it away. I afterwards picked it up and found it was a mask, and took it with me.

The rope which you hand me is the kind that was tied around that club. I noticed some of the same kind of rope on the clothes line, or near the lattice work there. There was some that run over there, and there was some near that lattice work. Some on the lattice work and near the clothes line.

Ned Winchell, the Deputy Sheriff, compared the two ropes together in my presence—the rope on the clubs and the rope on the clothes line.

I saw one bullet-hole going through the closet or back of the closet; there was another bullet-hole over

the closet door. There was one just above this opening in the fence, the direction of which was down. There was two or three through the fence, and it went right through. They went through into the other fence. The angle or direction of the ball above the door was up like my hand, and the one that went through the door was nearly on a level, and the angle of the one that went through the fence was downward. Some one put a pencil in there and it went right through the fence about northeast and downward. It was right near the boards. I looked at that hole a great many times but never saw any powder marks. The one that went through the door of the water closet I did not find where it went after it passed through the back of the water closet. I noticed the bullets in the east fence and where the bullets went through the Clark fence. They entered from the McWhirter place going out towards the alley, and went through the fence into the Clark yard. The ball at the bottom of the board went outward and so did the one through the back of the water closet, and the one that went up through the hole had an upward course. All of these five bullets were outward. I found no bullets taking an inward direction at all.

I was there in the chicken yard when the bullet was found when the coroner's jury was there.

I was at the coroner's inquest and went from the courtroom to McWhirter's place with the coroner's jury, and I saw the board in the chicken yard in which was imbedded a certain bullet, which was pointed out by Mr. Thornton. I also remember a sack that was on the south

lattice-work on the chicken yard fence. It was on the north side of the fence, on the south fence. As near as I can remember the fence was made of slats, with laths in between places. The sack was on the inside of that, about 13 feet 6 inches from the junction of the middle fence to the back fence and about fourteen and one-half inches from the ground.

The sack was a common gunny-sack, a barley sack nailed up, flat and doubled. That is, there were two thicknesses of it. The hole on the south side of the sack, towards the fence, was about the size of a dime. I should say about as large as my finger, and the other hole was larger than a half a dollar. The last I saw of that sack and that board they were at the Sheriff's office, and they were taken there by me, and I think I turned them over to Coroner Brown at the Sheriff's office. I did not see the bullet taken out of that board.

As far as I can see these clubs and exhibits are in the same condition now as when they came into my possession, and when I turned them over to the Sheriff, except this club had the tack and the rope around it. The clubs were in the same condition when I turned them over to the Sheriff's office as when I found them. With regard to the pistol there was three loaded and three empty.

Cross Examination.

When I first heard those shots on the morning of the 29th of August, I did not make any effort to count them. All I can say is it left an impression in my mind that there were five or six shots.

That morning after daylight I observed some tracks near this open window, but I took no measurements of them. The tracks were very recent. The soil under the window was sandy, soft soil, and that near the window was wet.

I saw some foot prints in the alley going south from the rear, going toward Calaveras street, different in length and shape. They were going north up the alley and south down the alley. They were the only footprints that could be followed distinctly at that time. One of them was made by a shoe with a heel and the other one was by a shoe of some kind—a moccasin or tennis shoe without a heel. The heelless shoe measured 11 inches in length and $3\frac{3}{4}$ inches across the ball of the foot, and the other one was $11\frac{1}{4}$ inches in length by $3\frac{5}{8}$ inches in width. Equal in freshness with these was another mark of a footprint between the fence and the closet in the back yard, of a shoe with a heel. I found no mark of a heelless shoe in the McWhirter premises. The soil in the alley was very dusty.

I picked up the pistol with the letters delta H upon it. Officer Welsh was right there when I picked it up and I think Rupert.

I traced the tracks which I have described down south through the alley, across the street into the same alley in the other block, perhaps not quite half way through the alley in the second block between L, N, Calaveras and Tuolumne streets. When we got into this other alley the tracks grew very indistinct. The ground is harder there, and there is a good deal of straw and we could not distinguish the tracks. It was not dusty like this alley

here. That part of the alley was not as much traveled then.

From the appearance of the tracks of the person wearing the heelless shoe as he returned to the south toward Calaveras street, I had an impression that he was running. I don't know that I can explain my reason for thinking so. It was the impresssion I had from the length of the steps. I think the steps were apparently longer than those going north. George Rupert was with me when I traced those steps. Officer Welsh went with me into the alley, whether he went with me the full length I could not say, and Mr. Rhodes I think was also with me.

This examination of the footsteps took place immediately after finding the revolvers and the clubs. It was before daybreak. We went with a light. We looked at them after daybreak, but they had been almost obliterated, there had been so many people in the house.

I know Thomas Bury, detective. I first met him in Fresno. He arrived there immediately after the murder. I cannot say whether it was the same day or not.

Bury was there when the coroner's jury visited the premises.

Q. Did he inspect that seventh bullet hole concerning which you have testified, through the gunny-sack?

Mr. Campbell—We object to that. Mr. Bury is not on trial, or anything of that kind, and it is not cross-examination of anything that he said or did.

The Court—This witness testified to seeing the holes there. I think that is a proper question so far.

Mr. Campbell—We will take an exception.

Q. When were you made acquainted with Bury?

Same objection, ruling and exception.

Q. When did you become acquainted with Bury?

A. Very soon after the murder. Mr. Bury accompanied the coroner's jury to the McWhirter premises when you pointed out the seventh bullet-hole upon the north side of the fence when the sack was in place. Bury measured the distance from the fence to the bullet-holes with a metallic tape-line which he had, about half an inch wide, and he ran the tape-line through the bullet-hole and extended it to the place where the seventh bullet was found. He was endeavoring to get the range as well as the distance, and the effect of the movement of the tape-line upon the outline of the hole through the gunny sack was to enlarge it. I think that Bury had a lens or magnifying glass at that time of about 3 inches in diameter. After that seventh bullet was pointed out to me I examined the aperture in the sack with the glass. The hole in the sack had the appearance of being a bullet-hole, and the edges were apparently new.

Mr. Campbell—I move to strike out the testimony, because he is not shown to be competent to give an opinion.

Motion denied and exception.

I examined the edge with a lens or magnifying glass. The sack was apparently an old sack, having been left there on the fence for some time. There was dust and dirt upon the sack. In general the sack looked like a very weather-beaten sack. The color of the edges of the hole was lighter than the body of the

sack, and was nearer a yellow than anything else. The hole on the north side of the fence appeared to be about the same. The sack was nailed to the fence, and I don't know who tore the sack off.

To the best of my recollection now the soil in the chicken yard is a kind of sandy. On the north side of the sack there were places in the yard where the soil had been disturbed, apparently dug up, for a distance of seven or eight feet. When I first saw the board with the bullet in it, it was in the fence there. It was a kind of a baseboard. The top of the board was 12 or 13 inches. It was not a very long board, as I recollect it. I saw a bullet partly imbedded in the board, and the bullet which you show me looks very much like it. Where the bullet entered the plank it left a kind of path, scraping along, and it plowed up a path.

The appearance of the scar or track of that bullet in respect to newness in comparison with the rest of the plank was much newer. The bullet looked like a newly fired bullet. It had a metallic look about it. I don't know how long I have been acquainted with firearms and their use. I have been handling firearms for the last two years as an officer.

Q. Now, at the same time when Mr. Budd was present, three at least other bullets were found in the north main fence of the McWhirter premises. Were they?

A. Yes, sir. The boards were weather-beaten, pine boards and dirty. The three bullets and the 7th bullet so-called, which were found by Mr. Budd and yourself had all been fired directly into it at a right angle. In regard to those other three bullets, they presented the appearance of being aged.

When I said the south hole in the sack was as big as a dime and the north hole as big as a dollar, I had reference to the time before any tape-line had been put there, to my knowledge.

Q. How far were those two apart; I mean the two holes?

A. The thickness of the cloth. I think the large hole was a little more ragged. The smaller hole was cut cleaner or clearer than the larger one.

I never saw a bullet-hole before in a gunny-sack. You might say my experience with firearms has been limited. I have used them some, as a police officer. The sack was nailed loose on the fence. It was not drawn tight.

At the time the coroner's jury were there I know some one attempted to get the bullet out of the board, but Mr. Thornton objected to it.

Something being said about a small rifle that Mr. McWhirter had was what lead to the search for other bullets along the north line of the chicken yard. It was said that it was a 32 caliber rifle. There were two bullet holes and a bullet found along the base board on the same level as that found in the board in the corner, running along the same line of fence.

It was about thirteen days after the death of McWhirter that the coroner's jury made this examination.

The cutting up I speak of in the chicken yard was about seven or eight feet square in the middle of the yard.

Thomas Rhodes, a witness called on behalf of the defendant, testified as follows:

Q. Did you hear Mr. George Rupert at the time that one of these pistols was picked up, state it was the pistol of Louis B. McWhirter?

The Court—You should have asked him if he heard anything about it.

Mr. Thornton—We object to that. It has already been answered, and is purely negative testimony, and does not prove anything.

The Court—Objection sustained.

Mr. Campbell—We except.

Mrs. M. Bedford, a witness sworn on behalf of the defendant, testified as follows:

I live on L street, between Calaveras and Stanislaus, in the city of Fresno, and lived there in August, 1892. I was slightly acquainted with Mr. and Mrs. McWhirter.

I lived about 240 or 250 feet away from them.

On the morning of the shooting I was sitting up in bed awake, and I heard the shooting commence, and there were three shots fired, and then a woman screamed, and at that time I jumped right up—a woman screamed at the third shot, but I did not know who it was at the time, and I jumped up and ran to the window, and I heard six shots before I got to the window. I heard three shots before the scream and three afterwards, and that is all I heard. I counted them.

I went to Mrs. McWhirter's about half-past twelve that day, and in a conversation I had with her, she spoke about a conversation she had with her husband the day previous. She spoke about how she should rear their boy, and what he would like her to do; that

he would like her to raise him up to be polite and gentlemanly, and not be wilful and have his own way, and to send for Mrs. Duke, and to have her stay with her for five years at least, and to have him educated somewhere in the East, I don't know where.

See told me that Mr. McWhirter had told her that on the day previous, had made this request. That is, on Sunday, and if possible to send him to Europe for about three years at least, and she told him: "Papa, if you feel like that, why don't you write your statements down on paper, and I will carry it out to the letter if it is possible."

She told me that he made these statements to her on the day before, if anything happened to him what he wanted her to do with the child.

She also told me to go and look in a trunk that they had in the mountains, and see if he left a letter there, which I did, and I found a letter there, but it had been opened, and I handed the letter to her, and she opened it, and she said it was a letter that he had received from his mother in the mountains, and that was all I found there.

Afterward Mr. Lee Blasingame came in, and she asked him if they had opened the safe yet, she said there was a letter there for her, and he kind of said "No." I suppose she referred to Mr. McWhirter's safe, but I could not say. He did not make any reply to the second question.

Q. What was the second question?

A. If they found a letter for her, and he did not make any reply to the second question.

CROSS-EXAMINATION.

In that conversation she spoke about how happy they had always been, and what prospects they had ahead of them.

In counting these shots I did not count them out loud. I just counted them in my mind.

TESTIMONY OF MRS. McWHIRTER BEFORE CORONER'S JURY.

Mr. Budd—Now, if the Court please, we will read Mrs. McWhirter's evidence given at the coroner's jury:

I am the wife of L. B. McWhirter. At the time of his death on Sunday last he was 37 years old and some months. With the exception of 15 or 20 minutes, he was at home the entire day on the Sunday preceding his death, being absent between nine and twenty minutes after nine in the evening.

On Sunday Mr. Baker called and remained until about five in the afternoon, Mr. Thompson called, and Judge and Mrs. Tinnin came in the evening and remained until nine or five minutes after nine, and after they left my husband went for some tomales, and when he returned with the tomales, we found they were not as we desired, and he took them out into the back yard and threw them away. He then came back, and we went into the dining-room and eat our lunch. We then went into the back yard for a few minutes and came back into the house, and read. In 15 or 20 minutes I prepared to retire. I retired, and he did a short time afterwards. When he went

to throw the tomales out I did not go with him. He was not gone but a few minutes, and came back to where I was in the kitchen. After eating my lunch I went out to where the closet is, and went by the place where this opening is in the fence, and at that time there was no opening there.

He went to bed about half-past ten. The next thing I heard was my husband speaking to me, asking me if I heard any noise. He said, "I heard a noise as if some one was walking around the house and through the grass," and Dimple, Dimple, is our little dog. I listened for an instant and said, "I don't think you heard anything. It must have been Mr. Clark's windmill as I heard that made that particular creaking noise that a windmill makes in turning, and as I heard it often and often. I have often heard it in times past. He was sitting in the bed at the time, and with that he made a remark that he would eat no more watermelons this summer; that it had disagreed with him. I said "I would not eat any more of it if I were you, if I considered it was not good for me or for you in your condition." So he got up and put on his pantaloons and shoes, and he said to me as he left the room, "I am going out in the front way to see what that noise is." As he went out he must have struck the door bell. He called back to me that he had struck the door bell accidentally. I had moved into my dressingroom then, and as he passed the window, I said to him: "Was that you, sweetheart, that rung the door bell?" and he said: "Yes, I rung it accidentally," and he went on. He could not have more than gone to the closet door,

when I heard a report. I wondered if it might not have been a gate, and then the others came so rapidly I cannot account for them. I heard a groan, and then I ran into the yard, and he was already down, and anything that happened after that I have no clear recollection of. I was in my dressing room in the center of the house when the first shot was fired. On the first shot I wondered what the noise was, and then the shots came so quickly I thought something terrible must have happened, and I rushed out. I had two screen doors to open. I went through the enclosed porch. I don't know the number of shots that were fired. The firing had just finished as I got out of the house. I saw no flashes of a pistol. It was very dark when I got out. When I first saw my husband, he had fallen. My husband could not speak. He only moaned. It was about three minutes before any one came, and then Mr. Rhodes came, and Mr. Davidson about the same time and in an instant afterwards Mr. Clark, and two other gentlemen, and Mr. Clark and one other gentleman, I don't know who, brought him into the house. My servant came to me first, and then she ran over to Mrs. Southwood's and to Mrs. Clark just as the neighbors were coming.

At the time I got out I saw no one escaping. I did not hear anything in the shape of voices or anything else but his moan.

My husband had spoken about certain parties. We were remarking when we were eating something one of the gentlemen who had called told us, and we were discussing that almost during the entire meal. He told me that he thought he might have some difficulty

during the campaign. He felt that it was very evident, but he felt that if any one attacked him in an open way he could protect himself. I said to him: "I am so afraid of your life." He said: "On the street in the open daylight I am equal to any one else. I have no fear." He said to me all along about being killed and all that sort of thing, but the idea I have always derived from his conversation was that some one would attempt to kill him, and would wound him, and he might die from that, but I never supposed that he would be assassinated. The idea he has tried to impress me with, because I always became very much alarmed and very nervous, and was to keep me from feeling that he had a fear of assassination, because he evidently felt it very strongly. He told me that he had been followed by two parties at night, prior to his going to town. We started for the mountains on the third of July, and returned on the 21st of August. He did not know who it was that followed him. He told me that just before the primaries he was working in his study very late one night, and he heard a man making a slight noise, and my husband went out into the yard and asked him what he wanted, and the man went away very fast. He could not see who the man was, or anything about him. Since his return to the mountains he did not say anything about anybody following him home. There has been in his thought and in his mind a certain kind of presentiment that would lead me to believe that he anticipated death surely to come to him during this campaign, because things that we had discussed in regard to our little son would make me very serious indeed. I said to

him: "What do you mean—you will live a great deal longer than I." He said: "It is very uncertain for one such as I am." He never went into particulars. My idea was that he was not to be murdered, but that he might have some difficulty. On the Sunday previous to his death we discussed at our dinner the manner of taking care of our little son, and the manner of bringing up children, in the presence of Mr. Baker, and how he thought children should be educated, and the schools he should attend, and the manner of raising children. He always said to me that if he was called away from me, and was not able to raise our boy, "One thing I beg of you is that you shall control his will."

On Sunday I asked him to make me a waste bucket in the morning. He said he would make me two now, so he made two buckets. He simply said: "I will probably be busy in the morning, and I had better do it now, while I have time, even if it is Sunday."

I think he realized very thoroughly how he would come to his death.

He first told me about putting life insurance on his life in March of this year. The reason he gave me for doing so was that one who spoke as he did and gave his opinion so freely, were never, in a place like Fresno, sure of the future. I remember at different times he had told me he had taken life insurance out, and I laughingly said to him: "Why, papa, why are you carrying so much life insurance for?" and he said, "I am going to carry it until after the campaign," which was after the November election.

At the time of the shooting there was a light in the house. We always kept a light burning in the dining-room.

He never went out through the front door to get into the back yard before. When he got up he took the pistol from under the head of the bed. He had but one pistol in his hand when he left the room. He had at one time two pistols, one an old pistol, which he gave away. He had the old pistol just at the time he went to the mountains. He carried the new pistol in his scabbard. I don't know how he carried his other pistol. He gave the old one to my brother in the mountains.

During the whole course of my marital existence there was never anything which would tend to create the suspicion that anything but affection existed between Mr. McWhirter and myself.

I never have owned a pair of stockings of the material of which the mask was made. I have never owned any garment of that material, nor has Mr. McWhirter.

Mr. McWhirter's office was built in January or the first part of February, and after it was built there was a surplus of nails left over, which were put in a box and set by.

Mrs. J. A. Lane, a witness called on behalf of the defense, testified as follows:

In 1892 I was living in Fresno on L street, and there was one house and lot between my house and that of Mr. and Mrs. McWhirter's, with whom I was intimately acquainted. I was not in Fresno during the month of August, 1892.

Some time in the spring I had a conversation with Mrs. McWhirter in which she said: "I don't know what to think of Mr. McWhirter, he is always talking as if something should happen him, what I was to do," and she says, "It makes me feel quite badly."

We were over at Mr. McWhirter's house one evening, and Mr. McWhirter came in with his tomales and we were sitting at the table eating them, and he went on talking about living and having a good time, and enjoying one's self and spending money freely and so on, and he said to his wife laughingly, "Nannie thinks she is quite saving; she goes out occasionally in the kitchen and saves a little and thinks she is quite economizing," and she jumped up and says: "You know we are saving." He says: "I don't know; we always have a good time, think nothing of spending a hundred dollars any day. We always have a nice box at the theatre, and carriages and so on." Talking in that manner—rather an extravagant manner—he says: "I don't know how to keep this thing going. I am just trusting to a ticket in the Louisiana Lottery."

In a conversation that occurred in October Mrs. McWhirter told me that Mr. McWhirter had remained home quite closely on the Sunday previous to his death; seemed to prefer spending the day with her and the baby.

Q. What, if anything, did she say to you about being affectionate—particularly upon that day?

Mr. Thompson—We object to the question, if your Honor please, as being suggestive and leading.

The Court—Yes, that is a leading question, Mr. Campbell. Ask her what she said, but do not suggest.

Mr. Campbell—I take an exception to your Honor's ruling.

The Witness—She told me how they spent Sunday, and how he preferred to remain home with her. He first suggested that they take the baby and go to church, that he was quite old enough to begin going to church. She says, "No, we never could manage him in church." Then they decided they would go, and company came in and church hour passed, and they did not go; she told me they sat out under their trees—they sat under their umbrella tree, and she says, "We need some slop cans, Mr. McWhirter, and could not we fix some?" He said, "Yes, get them and fix them now," and she says, "No, wait until to-morrow," and he says, "No, fix them now, something might occur that we might not get them fixed," and she went and got the cans as he told her, and he pulled something from his pocket and he said, "By the way Nannie, this is something we ought to have had in the mountains." It was either a carpenter or blacksmith shop all in one, I don't know which one, and they fixed the cans, and sat out under the tree together, and they talked over about what they had been reading about that day, and the day passed on—the dinner hour and evening came on. That was about all she told me in regard to that day.

In one of her conversations after the 12th of October, 1892, she spoke about what he said in respect to the child; how he should be educated; how he wanted him carried through good schools and given a good education, and raised to be strictly honorable—honest in all his dealings.

She was talking one day, and she said to me, "Mrs. Lane, you know he left me a letter telling me to bear up under it, if anything should happen, not to give way to grief, because she says, " You know it would kill me, and to live for their child's sake. She said "Don't mention this, Mrs. Lane," and I said, "Certainly not, Mrs. McWhirter."

CROSS-EXAMINATION.

This conversation about the theatre boxes and carriages was spoken in a laughing way.

I always thought Mr. McWhirter was very much attached to his wife and his child, and I always found him of cheerful habit and disposition. Never found any manifestations of melancholy or of mental distress, or anything of that kind about him.

Mrs. L. R. Williams, a witness sworn on behalf of the defendant, testified as follows:

I know Mr. and Mrs. McWhirter, and lived near them on L street for two years. I was at their house between 10 and 12 o'clock on the day of Mr. McWhirter's death, and she said that on the day previous to his death he told her how he would want the house fixed, and how his plans would be, and how he should like to have it done, and how he would like to have her do, if anything should happen to him, and also about educating the boy—he told how he wanted it done, and seemed to impress upon her mind thoroughly as to how he wanted the boy educated if anything should happen to him. She said he repeated it several times to her how he wanted the boy educated. She said he

talked that day as he never had before, to her, and she spoke mostly of the boy. She said that he told her he wanted her to send him East to be educated, and then afterwards to Europe for three years, that these were his plans if anything should happen to him, that was the way he wanted him educated. She said she undressed the boy for bed as usual and he went out and kissed his father good night, that he was sitting on the front porch, and she started in with him, and he jumped up and said "Give me one more kiss," and he grabbed him and kissed him several times, as though he could not let him go, and felt as though something was going to happen.

Q. Will you please state what, if anything, Mrs. McWhirter said at that conversation, in relation to Mr. McWhirter's presentiments, if anything.

A. She kept repeating all the time as she was lying on the lounge, "Oh, he knew it, he knew something was going to happen to him that night."

Cross-Examination.

This occurred on the day of the death of Mr. McWhirter. I asked her if she knew who did it, and she did not answer. She seemed to be in very great distress, and was talking in an incoherent, disconnected way.

Q. Did she send for you that day, or did you voluntarily go over there?

A. I voluntarily went over there.

Mr. McWhirter's manner towards his child was always very affectionate.

RE-DIRECT EXAMINATION.

When I lived in the house adjoining Mrs. McWhirter's there was a large osage orange tree in front of my house that was dug up and thrown in our back yard, and these trees were left in the yard when we moved away. It had been dug up six months or eight before I moved away.

Mrs. Alice Linforth, a witness sworn on behalf of the defendant, testified as follows:

I knew Mr. McWhirter in his lifetime, but was not an intimate friend. After my marriage, Mrs. McWhirter and I visited as friends, as we always had done. I went to Mrs. McWhirter's house on the day of the death of Mr. McWhirter, between the hours of nine and ten o'clock, if I remember. Mrs. McWhirter spoke to me in regard to how unusually affectionate he seemed on the Sunday; that he had been with her during the day; and how he had talked with her in regard to plans to carry out with the boy, if anything should happen to him, if he did not live to raise the boy.

She did not say to me what the plans were to do with the child any more than to put him in one school, and keep him there and not change schools with him. She did not say to me what school that was or anything of that kind.

She said that when he kissed the little boy good night that he clung to him and kissed him over and over again, seemed as though he could not leave him, as though he had a presentiment that something would happen to him. That is all I know.

CROSS-EXAMINATION.

I went to Mrs. McWhirter's that Monday morning of my own volition and without invitation from anybody. I went as a friend of Mrs. McWhirter's. When I went in she seemed pretty much composed. She cried while I was there, and was very much distressed. I suppose I remained there an hour. I don't think any longer than that.

L. F. Winchell, a witness sworn on behalf of the defendant, testified as follows:

I know Mrs. McWhirter by sight only, but knew Mr. McWhirter very well. On the morning of the death of Mr. McWhirter I was awakened about four o'clock by George Rupert and Charles Packard. I did not hear the shots. When I first got there I went into the alley-way through the opening in the fence. Officers Welch and Babcock had the pistols and clubs. I examined the pistols and found that there were three chambers empty in each, and that both were loaded with short cartridges. I also saw the clubs and mask.

We examined tracks in the yard and in the alley. There were numerous tracks. The ones dwelt upon mostly were supposed to be moccasins or heelless shoe tracks. (This represents the alley.) At first I only followed the tracks as far as Calaveras street, and Mr. White was with me and walked out. I went back to the yard, and he returned shortly afterwards and then we followed them down. I followed them across the street and found the tracks continuing on the south side of Calaveras street. There were two tracks. There was a woman's track that seemed to be accompanying this other track—two tracks that seemed to

accompany each other. It had the tracks like I have seen made by a woman's shoe. We lost them in the rear of Guitano's. I followed them down Stanislaus street and across into the other alley, and also either way on Stanislaus street. I found no tracks south of Guitano's and none on Stanislaus street. In making my examination I scrutinized the ground closely. When we had traced the tracks as far as Guitano's the tracks stopped. South of Guitano's I examined the alley from one side to the other, and across Stanislaus street into the mouth of the alley, and found no tracks there.

The soil of the street was loose, on the sidewalk it was loose in places, a little dust, but generally pretty hard.

I did not find a single track south of Guitano's corresponding in any manner to the tracks that I found leading from the alley to Guitano's, or any indication of any.

I also examined the bullet holes in the closet and in the fence. These three shots could have been fired from one pistol, the one in the back of the closet, and the other in the cope of the roof, and the other through the lower portion of the fence.

Mr. Budd—Q. Did you put anything in these holes to discover the exact angle?

A. I did, the one in the fence only, and the other one I guided with my eye.

Q. How do you mean guided with your eye?

A. I took the position to get the angle of the shots in the board in the yard, and by moving from one place to another I got the angle of those shots. They

all came to me in the same position, and if I moved out of that position, they would not come to that point.

The shot or hole that went through the fence was specked with powder. I noticed some other bullet holes in the alley fence of McWhirter's, fifteen or sixteen feet north of the opening in the fence. They were about four feet apart, and I also found two holes in the Clark fence across the alley, and I found that those holes came from one point. I can prove that they had been fired from one point. I moved around and back and forth until I could see through the holes in the fence, and they seemed to diverge from one point.

I examined the rope first that was on one of the clubs, and the manner in which it was put on, and the ends of it that were cut. The rope was wrapped around the club, and it was tacked on with a brad. It was an old nail. I know I took the rope off to compare it with some other rope, but the nails were not driven in to any great depth. It stuck out considerably. I took the rope off to compare it with the end of some clothes line that hung in the north end of the lattice work, and I found they were both the same kind of cotton rope. One end of the rope had been cut clean, like as if made with one stroke of a knife—not square across, but diagonally across the rope. The other end, if anything, had been cut with two strokes. It had a little jog in the end of it like. I also examined the rope on McWhirter's clothes line, and took some of it down, and it was the same kind of rope. I mean to say there was a jog on the rope that I found

in the club, and also a jog in the rope that I found in the yard on McWhirter's fence. The rope that was cut from the fence corresponded with the end of the rope that was taken off the club.

Q. Did they jog in, or how?

A. Yes, sir; they met there perfectly, and I examined particularly the one with the ragged cut. The ends were fresh and solid then.

Exhibit 7, People vs. Heath, resembles the club very much. It was jagged at one end, and had an old end on it, which was black. I examined the other end of it, and where it was sawed on both of them. I know it was sawed both ways, and the sawing was rough in two different directions. I noticed that particularly. I also made an examination for other bullet holes on the fences in the inner part of the yard, the back of the office and the back of the house, and the lattice work, but found none.

I made this examination on the day of the morning on which McWhirter was killed.

I was in charge there all day. Mr. Hensley, the sheriff, sent me up there, after I reported to him, to take charge of the yard, and keep intruders out and protect the family.

I never made an examination on the inside of that chicken yard.

CROSS-EXAMINATION.

The tracks of which I spoke I examined by the light of day. I think the heelless shoe was the larger. The woman's track had a heel on it.

I was one of Mr. Hensley's deputies during a portion of his last term, and held office under him to the date of the expiration of his term.

The tracks of the heelless shoe and the heeled shoe went north and came back south. There were other tracks coming into the alley—in fact, my own and Mr. Packard's came into the alley.

When I arrived on the McWhirter premises there were very few in the rear portion of the yard. Mrs. McWhirter came out, and I spoke to her about some things. There were quite a number near the front yard and about there. That is where I met Officers Welsh and Babcock, and there were several around them.

In the alley there was but one set of tracks, apparently made by a heelless shoe.

J. A. Lane, a witness sworn on behalf of the defense, testified as follows:

In 1892, I lived about 37 feet from him, and had always been very friendly with him and his wife.

I was not in Fresno at the time of his death, and did not return to Fresno until about the middle of October. Some time in April, I think, 1892, I drove up to where Mr. McWhirter lived, and he asked me if I had time to take him to the cartridge works, he had some business there, and he got in the buggy and we talked about things generally, and I brought him to Mariposa street, where his office was, and he said he wished to talk to me a little bit before he got out of the buggy, and which is the time he made his statement. He told me he had been taking out some insurance policies, I

think he said they amounted to something like $40,000, or $50,000, and he went on to say that he wanted to make a statement to me about this, and that he was being examined for more then. He said he expected to take quite an active part in our county politics, and that he expected also to be a contributor to the press during this campaign, I understood him, and that he had taken out these life insurance policies as a protection to his family. He said he expected to be killed during the campaign, and he further said to me—explained to me the reason he made this statement to me was that in the event of the insurance companies not wanting to pay his policies, that he wanted me to be a witness against them in Mrs. McWhirter's behalf, and he stated further that he had told the insurance companies that they were taking an unusual risk, that he had stated to them about this danger that he felt he was in.

CROSS-EXAMINATION.

I think Mr. McWhirter referred to local politics, but whether to city or county, I do not know.

Dr. J. C. Cooper, a witness sworn on behalf of the defense, testified as follows:

I am a dentist, and have lived in Fresno for the past fourteen years. I knew Mr. McWhirter some 2, 3, or 4 years before he died. At the time of the shooting I was at my residence, which is about a block and a half from his house.

I heard five or six shots. I don't know exactly how many it was. I should say I do not think there were over six or under five. I was awake at the time, and

all the windows in my bedroom were open, and pointed toward Mr. McWhirter's house. I was up when I heard the shots. They came one, or two or three at a time, and then a little interval, then one, two or three more. I heard the screaming when the shooting was about half over—in the midst of the shooting. Between five and ten minutes after I heard the shooting I got out of the house, and went to the McWhirter residence with Mr. Rorer through the alley, crawling through the fence where a couple of boards had been knocked off. There was nobody in the backyard when we got there. They had carried Mr. McWhirter up on the porch and just taken him in. I went into the house and saw several men there, and Mrs. McWhirter. I remained there until Dr. Pedlar came in, it might have been five or ten minutes. Before I left the McWhirter residence there was quite a number of people who came in. I remember meeting, as I was leaving, Officer Babcock and another officer with him, going toward the McWhirter premises. After sun up that morning I returned to the McWhirter residence, where I saw Mr. Baker, Mrs. McWhirter and Mr. Lee Blasingame.

(Witness temporarily withdrawn.)

Lee A. Blasingame, a witness sworn for the defendant, testified as follows:

I reside in Fresno County and am a brother of Mrs. McWhirter. On the Friday previous to his death Mr. McWhirter did not come to me and say: "Lee, if anything happens to me, I want you to take care of my little boy." He never made that remark.

At the Blasingame ranch, as Mr. McWhirter and his family were moving out of the mountains, he stopped there to change horses and get his dinner or lunch, he remarked, "Is not that a grand boy, the smartest boy in the United States," or something to that effect. "I am going to make a United States Senator out of him," or something of that kind. I cannot give you the exact conversation. He says: "I want you to look after him if ever—if ever we have to travel, or if we travel, I want you to go with us," or something to that effect.

I reached Mr. McWhirter's house on the morning of his death at about half past seven. I do not remember seeing Dr. Hooper there. At that time in the backyard of Mr. McWhirter's premises, I did not say to Dr. Hooper or in his presence, "Poor Mac, poor Mac, it was only last Friday that he asked me to take care of his little boy if anything happened to him."

CROSS-EXAMINATION.

I did not see McWhirter on the Friday previous to his death. I saw him on Tuesday or Wednesday of that week. I think we spoke.

Dr. Cooper, re-called, testified as follows:

On my return to the McWhirter house on that Monday morning I saw Mr. Lee Blasingame there. Out in the yard between the office and back door, Mr. McWhirter's little boy came out, and Mr. Blasingame said: "Poor Mac, Poor Mac, he only told me last week if anything happened to him to look out for his boy."

CROSS-EXAMINATION.

I could not say whether he mentioned any day of the week or not. I think he said Friday, I am not sure.

I did not count the shots. I just passed it over in my mind. It seems to me the screaming began about the third shot. I heard nothing but the shots and the scream. I state upon my oath that there were not less than five shots, and am equally positive that there were not more than six. There might have been seven or eight, I could not say. I think there were only six.

RE-DIRECT EXAMINATION.

Six is my best impression, as I remember it.

J. D. Morgan, a witness sworn on behalf of the defense, testified as follows:

I am now and was at the time of Mr. McWhirter's death, City Marshal of the City of Fresno. I knew Mr. McWhirter and his folks very well. I went to his place about 8 o'clock on the morning of the shooting. I saw three bullets through the alley fence and some through the water closet. One of them was just to the left of an opening that was in the alley fence, just a few feet from the closet, and ranged rather downward. There were two bullet-holes in the closet. I did not find any others.

At another time I went into the chicken yard with Mr. Bury, the detective, who was representing the citizens of the county at the time.

I went into what is called the hen's nest on that map with Mr. Bury several days after the death of Mr

McWhirter. Those chicken nests are probably $2\frac{1}{2}$ feet from the ground. We found some saw marks on one of the boxes and some sawdust on one of the bins. The saw marks were made across the boxes rather diagonally crossing over the bins, and the sawdust was partly on top of the bins and partly down in the bins. I put the sawdust in an envelope and took it down to the District Attorney's office and gave it to Mr. Welch.

R. L. Rader, a witness sworn on behalf of the defendant, testified as follows:

I have lived in Fresno for the past seven years. I knew Mr. and Mrs. McWhirter. In August, 1892, I was rooming with Dr. Cooper. I would not be positive. but I think I heard five or six shots on that morning, I counted up to four, but after that I did not, but I think there was one or two shots after I stopped counting them—one or two after I counted four. Between the third and fourth shots there was a slight interval. I did not hear any other noise. I heard nothing but the shots. A noise in my house waked me first, and I was awake when the shooting began. I afterward dressed myself and went to McWhirter's with Dr. Cooper, and when we got as far as Clark's Mr. Eastwood was standing out in the yard and said that McWhirter had been murdered. We then went up the alley and tried to open the gate but could not, and we then went through the fence where the boards were knocked off. I wear a 9 shoe. When we went through this aperture in the fence there was no one in the back yard. I went into the

McWhirter house and saw Mr. McWhirter there. There were several people there. I stayed a very short time, and returned the way I came except that I went out the front gate. I did not go back through the alley. As I was leaving I met Dr. Pedlar and Mr. Davidson just at the door, and just outside the gate I met the policemen. From the time I heard the first shot until I met the policemen, was, I should judge, about 10 or 15 minutes.

CROSS-EXAMINATION.

When Dr. Cooper came into my room the shooting had stopped. After Dr. Cooper came into my room he opened up the door, and in opening up the door, his door was open and the windows were up, and I could hear the screams, and I went into Dr. Cooper's rooms, and then went back into my room to finish dressing. Dr. Cooper came into my room before I went into his. I counted the shots mentally.

RE-DIRECT-EXAMINATION.

I did not hear any screams from my room. When I went into Dr. Cooper's rooms I heard the screams.

E. M. Davison—A witness called for the defense, testified as follows:

. I have lived in Fresno for the past six years, and on the night that Mr. McWhirter was killed I lived on Calaveras and L streets, across from Mr. McWhirter's, and south from Mr. McWhirter's. My room fronts on L street, right opposite McWhirter's. I knew McWhirter very well.

The night he was killed I heard six shots fired. I was awake when the shooting commenced. My window was open. As soon as I heard the first shot I jumped right out of bed. Immediately afterward it was followed by two more shots, and then probably there was an interval of a second or two, and then I heard three more shots fired. After the third shot I heard a woman scream, and after the three last shots a woman helloed "Mr. Davison! Mr. Davison!" Of course I did not know who it was. My wife was awake at the time, and said that it was Mrs. McWhirter's voice. I ran across the street, jumped over the fence and went around on the south, and there in the back yard I saw a person lying on the ground and a woman bending over him. I think he was lying in a northwestern direction with his feet toward the house, and his head the other way. When I got there I thought I recognized a man standing back of where McWhirter's head lay. I could not swear who it was, but I afterwards learned it was Tom Rhodes, Clark's man. As soon as I saw what was the matter I went to Dr. Pedlar's office, and found that the doctor had just gone. I then went back to the house, and when I got there there was quite a number of people present, and I suppose they had carried McWhirter into the house, and only stayed a few minutes. Then I went back home and dressed myself and came back afterwards.

When I got back there were a good many people there, out in the alley and in the yard and everywhere. There was quite a crowd there.

Q. Did you hear any other noise, Mr. Davison, on that night, except the six shots and the screaming of the woman?

A. Not that I know of. I did not hear any quarreling in the back yard or anything like that.

Cross-Examination.

I was in bed when I heard the first shot, then I heard two more shots, then a scream or a groan or something. I could not say what it was. Then I heard the more shots. Then I heard a woman hello "Oh, Mr. Davidson, Mr. Davidson!"

The head of the deceased was lying further north than south, and I think he was lying on his back. I should say my house is about 280 feet from the post in Mr. McWhirter's back yard.

Albert Riley, a witness sworn on behalf of the defense, testified as follows:

On the night of the killing, I resided about two blocks from the McWhirter residence. I was awake that morning. I am unable to say I was awake when the first shot was fired or not. I counted six shots. I just awakened, counted the shots, listened to see if I could hear anything else. I did not hear anything else. I did not hear the screaming, or anything beside the shots.

Cross Examination.

I don't know whether I was awake when the first shot was fired or not.

P. G. Farley, a witness sworn on behalf of the defense, testified as follows:

I have lived in Fresno for the last four, five or six years. I think about five years, and on the night of the killing of Mr. McWhirter was a night watchman at the engine-house barn, which is about half a mile, more or less, from the McWhirter residence. I was awake and heard the shots. I can't say that I counted them. I think, if I remember right, the shots came something like this—two shots, then there was an interval between them; and in regard to the balance of the shots—I might be mistaken, and then I might not—I thought there were four afterwards. Whether there was more or less I would not be willing to swear to. Then I heard the screaming and some one hello murder.

CROSS-EXAMINATION.

The voice that hollowed murder seemed to me to be a woman's voice.

Mrs. Nelson, a witness sworn on behalf of the defendant, testified as follows:

Before I was married my name was Meta Peterson, and I lived at Mrs. McWhirter's, and resided in Fresno county about six months before the death of Mr. McWhirter, and lived with Mrs. McWhirter five months before his death and three months after it. I went to Tennesseee with Mrs. McWhirter after Mr. McWhirter's death.

Mrs. McWhirter and I are intimate friends.

The day before his death I was in the house in the morning, but went out in the afternoon. We had dinner on that day about two o'clock. After dinner I went down town and came back about nine o'clock.

When I got back, Mr. and Mrs. McWhirter were there. He had been down town to get some tomales, and got back just as I got home. It was about nine o'clock when I got home, and I then went to my room.

Mrs. McWhirter set the lunch herself that evening. McWhirter threw the tomales away out in the chicken yard and came right back. When he went to throw them away I was in the kitchen, and I think Mrs. McWhirter was in the dining room. H was gone a few minutes. He then went down in the cellar to get some butter, and he asked me to get him the ice pick, which I did. After I got him the ice pick I went to that room (showing on map) marked "Meta's bedroom," which is correctly represented on that map. There are two windows in that room. The bed is marked as it was in my room. I think I went to bed that evening about half-past nine, and went to sleep immediately.

I slept a little while when I was awakened by some noise. I don't know what kind of a noise it was. I then went to sleep again and was awakened at the time of the shooting. I was in bed when I heard the first shot. I heard three shots in all—they were the last three that were fired.

After hearing the first shot I looked out of my window right at the head of the bed. The window looked out into the back yard. I saw two flashes, which came from the back yard. I could not see anything except the flashes. I could not see any of the objects in the yard. I saw nothing but the flashes.

I did not see or hear any person run away, and did not hear anything between the first shot and the other

two shots. Mrs. McWhirter was in the dining-room when the last shot I heard was fired, and she then went out of the house. There was one screen door and one other door from the dining-room out into the back porch. They were fastened with a hook, and were hard to open. I saw her go down the steps a short minute after the last shot.

At the time I saw the two flashes, I saw none of the objects in the yard. After Mrs. McWhirter found Mr. McWhirter she called me, and I went right out. I put on one dress, and ran out there in my bare feet. When I got out there Mrs. McWhirter was screaming. I asked her what was the matter, and she said "Some one has murdered my husband." She sat down and took his head in her lap, and told me to run for the doctor. I ran to Mrs. Southwood, for I did not know where the doctor lived.

When I got out there, Mr. McWhirter's head was toward the chicken fence, about four feet from it.

I did not hear the door-bell of Mr. McWhirter's house ring before I heard the shots, and did not hear any one go out of the house, or walk around the house.

When I saw these flashes, I heard two reports, and some one groan after the last shot.

I did not hear any person run away or get over the fence, and did not hear any other noise except the groan.

I won't swear that I saw anything fall. I did not remember the occurrence better the Monday after the death than I do now. I remember it all now.

On the morning after Mr. McWhirter died, I remember telling Mrs. Judge Crichton, out in the back yard, that I thought I saw something fall.

Q. Did you at that time believe you saw something fall?

A. I was so excited, and after I thought over it I thought I had seen nothing.

I talked with Mr. Welch and two other gentlemen, I don't remember when, but I think Mrs. McWhirter was present. I don't think I told Mr. Welch that I saw Mr. McWhirter fall.

CROSS-EXAMINATION.

At the time of Mr. McWhirter's death I had been in the United States six months, and did not understand the English language very well, and do not understand it very well yet. I did not understand it as well then as I do now.

When I testified at the coronor's inquest and at the Heath trial I had an interpreter.

When Mr. McWhirter went out to throw the tomales away I think he was out about one minute. He came back right away—just about long enough for him to walk to the back fence and back again.

The noise I heard the first time I awoke seemed to be in the alley. Then I went to sleep again, and I don't know what awakened me the second time. I raised my head up and looked out the window and saw two flashes. The flashes were toward the house. I could not see any object in the yard at all.

In going out from Mrs. McWhirter's bedroom she would have to go out this door in the dining-room, and then out that door onto the porch, and then

through a screen door here to these steps, and then go out into the yard (showing on diagram). In going out, I went out this door from my bedroom into the litttle hallway, then out the screen door and down the back steps from the kitchen. Before leaving my bedroom I looked out this other window that looks out onto the side steps. I do not remember whether or not I heard Mrs. McWhirter scream before she left the house. I know I heard her scream. The screaming commenced after the last ——

Mrs. McWhirter did not stop to dress. She went out in her night clothes. I went out as quick as I could after she went out, only stopping to throw my dress over me.

When I am in my room I cannot hear the door bell ring unless it rings very loud.

In the conversation with Mrs. Crichton and Mr. Welch, I did not understand every word they said to me, and I could not talk very good English in reply. When I was talking to Mr. Welch I do not remember whether Mrs. McWhirter was present or not, and I do not remember whether she took any part in or paid any attention to the conversation.

RE-DIRECT.

The night that Mr. McWhirter was killed was not a very hot night.

The windows were down, and I looked through the glass window. The flashes came from the same place in the yard.

Mrs. W. D. Crichton, a witness sworn on behalf of the defendant, testified as follows:

On the morning of Mr. McWhirter's death, I saw Meta Peterson in the kitchen of Mrs. McWhirter's washing some garments. I had a conversation at that time in relation to what she had seen.

Mr. Campbell—Q. What, if anything, did she tell you at that time and place in relation to what she had seen.

Mr. Thornton—We now renew the objection on the ground that it is an impeachment of their own witness, and that the matter is collateral and immaterial, and that nothing she could have said could possibly bind us.

E. E. Brown, a witness produced on behalf of the defendant, testified as follows:

I reside in Selma, Fresno County, Cal., and last term was Coroner of Fresno County, and was such at the time of the killing of Louis B. McWhirter, and held an inquest on his body. I think it was on the 10th of September, 1892, that I I went with the coroner's jury to view the premises. That was the day of the verdict. At the premises I saw a board with a bullet in it. The board was in the corner of the chicken yard, a board about 18 inches or two feet long and a foot wide. I think it was Mr. Thornton that called my attention to it, and I think at his request the board was removed. I think the board was part of the base board or put in to stop up a hole. I removed the bullet in the presence of the coroner's jury. I also saw two or three holes in the sack. I do not remember how many sacks were there on the south side of the chicken yard at that time. I think there was a number of small holes in that sack

at the time. I saw one hole that went entirely through the sacks. The board and sack were sent to the sheriff's office by Officer Babcock. I have never seen them since. I do not think they were among the other exhibits that were marked for preservation by Mr. Welch at the coroner's inquest. After we got through with looking at the exhibits they were sent to the Sheriff or District Attorney's office—I don't remember which. I kept the bullet and produced it at the trial of People vs. Heath.

There was part of a bullet found in the fence above the chicken coop, some place in the fence there. I don't remember the exact location.

I think there was some objection at first to the removal of that board and that sack, but afterwards it was decided to remove them. I don't know who offered the objection. I think the objection was made because they wanted to make some measurements. The measurements were made. The bullet was lengthwise in the board, and had not penetrated very deep in the board. It looked as if it had been there quite a while.

CROSS-EXAMINATION.

I don't know whether the bullet hole through the sack was a bullet hole or not. The hole on the south side of the double thickness of the sack was larger. I don't remember the size of it. I did not pay particular attention to it. Some one there had a lens or magnifying glass, and I looked at the largest of the holes through the glass.

I think the size of the hole on the north side of the sack was smaller, and it was a little lower down than the other. There was not a great difference.

The board was common mountain pine about an inch in thickness, 18 inches or two feet long and one foot in width. In order to see the bullet in the board you had to stoop down because there was a rail at the bottom of the fence—a 2 x 4 stringer. I don't think the bottom of the stringer was over a foot from the ground. The bullet splintered the board a little, having gone in at an angle and raised a splinter. The length of the bullet was parallel with the board. The bullet was, I think, in about the center of the board. The rip, or scar, or splinter was half an inch long, and maybe three-quarters.. Under the splinter the color of the board looked fresher than the remainder. It did not look like a fresh splinter, though. The color of the bullet was rather dark. It was not bright like it is now.

I could not say that Mr. Thornton objected to taking that gunnysack off that fence, although I think he objected until some measurements were made. There was some one objected, and after they used the tapeline they did not make any more objections.

I know Mr. Thomas Bury, but I don't remember that he was there on that occasion. I think there were 25 people there at the time. Some one used a tapeline. I don't remember who it was—whether it was Bury or not.

The board was examined by the jury and set down by the fence. One of the jury that examined it started to remove the bullet, and I took the knife and

removed it myself. I saw that it was loose, and took it out. I don't think I looked at that board to exceed twenty minutes in my whole life. I took the board out of the chicken yard, and I think you (Mr. Thornton) took the sack. Outside of the chicken yard I gave them to Officer Babcock. I never saw them after they left that place. The sack was an old, weather-beaten sack. You could not tell much about the holes.

I did not remark the edges. I don't think in an old sack you can tell the difference between fresh holes and old ones. I have no experience in these things, but I don't think you could.

RE-DIRECT-EXAMINATION.

The sack looked as if it had been there over one winter, and it was sent to the sheriff's office for preservation. I don't remember any objection to the board and sack being removed. I took the two bullets down and had them weighed, and never paid any attention to the matter until they were called for in People vs. Heath, when I produced them in court and did not see them again until the present time.

H. H. Welch, a witness sworn on behalf of the defendant, testified as follows:

I reside in Fresno, and am an attorney-at-law. I was the deputy district attorney who conducted the coroner's inquest and made investigations as to the death of McWhirter.

I called at the McWhirter residence the day after the funeral. At that time I examined the water closet

also the fence and the hole in the back fence, and some parts of the woodshed and stable, or whatever it may be, in the other part of the yard, also the clothes pole, and things around there in general in the back part of the yard.

With reference to the bullet-holes, I first found three bullet-holes in the closet. The first hole I noticed was the one through the back part of the closet, about the center of the closet. I found it almost entering in the center of the door. I opened the door in such a way as to place myself in front of the hole. I put a pencil in and took a range. The range was about probably ten degrees upward from the level. I examined the other one in that corner of the closet, and another one which was in the back fence, and put pencil in the three holes, and then placed myself where I could get the range of a man firing, and the three holes came to the same point. I also put a pencil in the holes and got a range across the alleyway, and they seemed to have crossed the alleyway. All the shots were from the inside, out.

I also saw the place where the boards had been knocked off. I did not make any other examination of the premises for any other mark. I found the clothes line on the lattice work. I just examined the end of the clothes lines, and I think before we left the premises that I had a piece of the clothes line taken to the office. I did not examine the end of the clothes line. I examined the clothes line around the club for the purpose of comparing the two. I went to the clothes pole where the body had fallen, and examined that, and made some measurements and other dis-

tances and other things. We were called into the house about the time we got there. We went into the house. Sheriff Hensley and Mr. Bury were with me. I think Mr. Bury was working for the county then. There was about $25,000 reward offered at that time for the person who committed the deed. Mr. Bury was first employed by the citizens. We desired to employ a detective. I spoke to Mr. Thacker and Mr. Hume, who both recommended Mr. Bury. I then spoke to the Supervisors, and they told me to make any arrangements I could with Mr. Bury, which I did.

When I went into the house I found Mrs. McWhirter and a brother of Mrs. McWhirter's, a young boy about 13 or 14, and her little son. They were all in the dining-room. After having a conversation with Mrs. McWhirter the servant girl was called in.

There was a conversation held with the servant girl in the presence of Mr. Bury and Mr. Hensley and myself. There was a conversation occurred by questions being asked by all of us. There were a great many questions asked by Mrs. McWhirter.

Q. Was any statement made by the servant girl as to what she saw when she looked out at the back window?

A. Yes, sir.

Q. Please state to the jury what it was she stated she saw at that time and in the same presence.

Mr Thornton—We renew the objection.

The Court—I am very clearly of the opinion that in cases of this kind impeachment is not permissible. The objection will be sustained.

Mr. Campbell—Note an exception.

Mr. Budd—Q. Did she at the time and at the place mentioned, and in the presence of the persons stated, tell you that she had looked out of the window and at the last shot seen Mr. McWhirter fall?

Mr. Thornton—Same objection.

The Court—Objection sustained and exception.

Mr. Budd—Q. Did she at that time and in the presence of the Sheriff of the county, and Thomas Bury and Mrs. McWhirter state to you that she looked out of the window, and that she saw something white fall, and heard nobody run away, and no noises?

Mr. Thornton—Same objection.

Objection sustained and defendant excepts.

The Witness—After we came out of the house we went into the northeastern end of the yard where the outhouses are through sheds, and things like that. I mean in the chicken yard.

We simply passed through the sheds, looking at different sheds, at the gates, and things of that sort there, and we found some nails, I think, in this part of the shed, here in some boxes, or tin cans, or something of that sort.

I think in a shelf they had there in the chicken house in that place where the chicken nest was, and we also found a saw in there. I don't remember whether the saw was hanging up or whether it was across some boxes. Some of the nails were afterward taken out and marked as exhibits before the coroner's jury. They were similar in size and age to the nails which you hand me, but it seems to me there were more shingle nails than there are here. We took away about half a handful with us, and a number of the nails were put in as exhibits at the coroner's inquest.

I also saw the nail in the club found at McWhirter's. I think it was similar to the nail with the mark around it. I remember it as being one of those square-pointed shingle nails. I think at the coroner's inquest, when the nail was introduced in evidence, it came out of the club, and if I remember right I put a string around it to distinguish it from the other nails.

(Remainder of nails offered and admitted in evidence.)

The Witness—I remember that these small nails were very much rusted from exposure. They apparently had been very wet. The condition of rust on those nails and on the nail found in the club was very similar.

The saw we found in McWhirter's back yard was very similar to the saw which you show me. This may be the one. It has my initials on it, which I put on at the time of the coroner's inquest. The teeth of the saw we brought back from the house were covered with a woody substance, woody fibre—that is, inside of the teeth had some sawdust in them—it was not sawdust, it was wood fastened onto the inside of the teeth of the saw like cheese along the blade of the knife with which it was cut. It was not on the blade of the saw, but was in the teeth. I took the saw at the time and handed it over to Mr. Hensley and told him to keep it with the other exhibits. I marked it at the coroner's inquest, and after I deposited it in the treasurer's office when the coroner's inquest was completed. I have never seen the saw since. The saw is

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not in the same condition now as it was then; the teeth have not got that woody matter inside of them, the teeth now being apparently clean. If this is the saw that I brought back, I was present when we called in an expert carpenter, Mr. Davis, in the courthouse yard. He was the foreman of the courthouse. I was present when he made an experiment with the clubs to determine whether the cut on the clubs could have been made with that saw or not, and whether the jagged tooth would show. There was at that time a very perceptible jag in one of the teeth. I do not notice it now.

Q. Mr. Welch, we were so unfortunate to break the vials the other day. I will ask you to look at the corks of these vials. Did you cork up any of the sawdust?

A. Yes, sir. Some was in my office. Mr. Morgan and Mr. Bury brought me some sawdust which I put in a bottle. I don't remember whether it was the larger or the smaller bottle. I don't remember whether any of the sawdust in the teeth of the saw was put in the vial. That sawdust was saved, but whether it was put in the vials or not I could not say. I don't think the sawdust was introduced in evidence at the coroner's inquest. They were not opened. I could not say that one of these vials contains the sawdust that was taken from the teeth. I know that one of them contained the sawdust brought to me by Mr. Morgan or Mr. Bury. The sawdust with the chicken feather in is the sawdust brought to me by them.

The color of the sawdust that came out of that saw I compared it with the sawdust that Mr. Davis made

from the osage orange clubs, and it was similar in color. (Saw offered in evidence, and marked............... ....) After the examination and when the coroner's jury went down to visit the premises, I took the exhibits, marked them and took them down to the treasurer's office. I was never asked to place in the exhibits any board or gunny bag. Those are the clubs that were there. I have got my marks on them both.

With reference to the mask, the first time it came into my hands was the time of the coroner's inquest. I think I had seen the mask in the sheriff's office before, but at that time it was tied around this hole. I placed it on my head and it dropped right over it. At that time I untied the knot in this string, and there dropped out a sliver of cloth—a small piece of cloth that was in the folds of the cloth in which the knot was tied, inside of the knot, and when I opened the knot this dropped on the floor right before the jury. I did not tie it back. I left it open.

CROSS EXAMINATION.

I first met Mr. McWhirter in 1888. We were always friendly. The last time I talked to him was when the case of Perrin Brothers was dismissed in the Superior Court. I think that was some two or three months before his death. It was a criminal prosecution, and the matter grew out of some money that Mr. McWhirter loaned the Perrin Brothers there in Fresno, and he was the complaining witness. He had them arrested.

I visited the premises for the first time after the death of Mr. McWhirter on the afternoon of the

day after the funeral, about two o'clock. My recollection is that at that time I gave a piece of the clothes line hanging on the lattice work to Mr. Hensley to bring away. I don't know that I can pick out the piece of rope from among those which you show me. I don't know that it was any of those pieces. I know that it was a piece about that size and length—a similar rope. I gave it to Mr. Hensley to bring away, and have never seen it, only at the coroner's inquest. Mr. Hensley, Mr. Bury and yourself were present when I obtained the rope. That was the only time I was ever there with Mr. Hensley.

The subject of the correspondence of the ends of any piece of rope which I found with any piece of rope hanging upon the lattice work was not called to my attention.

I do not remember how many pieces of rope I saw, or which were placed in my official custody as exhibits in connection with the coroner's inquest.

Reading the testimony at the coroner's inquest now indicated that I put tags upon those pieces of rope when I put them away. I put them in evidence, and these tags were placed there for the purpose of showing where they came from, or to identify them. If the tags were on the ropes now, I would probably be able to identify them. But they are not on there now.

My recollection is that the teeth out of place in that saw which we took from the McWhirter premises was in the center of the saw. I see nothing in the saw which you hand me to indicate that a tooth is out of line. I cannot see the slightest trace of hammer or file or rectification of the teeth

of that saw. The teeth show on one side that they have been set, but as to when I could not state. Every other tooth on the left hand of the saw, the teeth being held upward, would show a mark as to being set, and that is uniform.

I went to those premises the day after the funeral, which I know was some days after his death, but I don't know the day of the month or the day of the week. If he was buried on the 31st, I went there on the 1st.

I never noticed any osage orange until I saw those clubs. I have no knowledge of the qualities or physical appearance of sawdust made of osage orange timber. I never saw any until I saw it in my office. I could distinguish osage orange sawdust from pine or redwood. I could tell it was a different wood from mahogany or redwood. I could not tell the difference between osage orange sawdust and sawdust made by sawing a lemon or peach tree.

We had what we knew to be osage orange wood and we took the sawdust which Mr. Davis made and the sawdust which Mr. Morgan and Mr. Bury brought, and we made the comparison at my office under a microscope. My recollection is that Mr. Davis sawed probably more than enough to cover the point of a knife out of some osage orange wood that was there in the office, which Mr. Bury had brought us.

I think that is the wood or pieces of wood that Mr. Bury had. I think that piece marked J. O. is a piece of wood that Mr. Bury and Mr Ward brought to my office, some time after Mr. McWhirter's death, after Mr. Bury begun working

on the case. One essential thing was to find out where osage orange wood had been cut, and they brought this to the office.

I think this piece marked.Bx—I think both of those pieces were pieces that were brought to my office, or rather, that I saw with Mr. Ward and Mr. Bury.

Some time after Mr. McWhirter's death I learned of a piece of osage orange wood being obtained from the vacant lot north of Mrs. Southworth's house. This was before the coroner's inquest and after Mr. McWhirter's death. I think Mr. Ward and Mr. Bury brought that piece to my office.

I don't know when they obtained it. I know this whole country was searched over for osage orange wood almost immediately after the death, and it may have been obtained then. They had scouts out in every direction to find where osage orange had been cut.

I went with Mr. Thompson and you (Mr. Thornton) to the sheriff's office one day, but I do not recollect that it was Monday, September 5th. I know you came to me and wanted to see some exhibits there, and we went there together, and I think that was the only time we went to the sheriff's office, I don't recollect whether or not that piece marked JO was exhibited to you at that time or not. I knew that you were there, and that you saw the clubs there at that time. I don't know whether you saw anything else besides the clubs or not.

I knew who Mr. Thomas Bury was before McWhirter's death but I did not get acquainted with him to know anything about him until after that. I first came into official relations with Mr. Bury the Monday

or Tuesday after Mr. McWhirter's death. His bill for services rendered was afterward audited and paid by the County of Fresno.

The first I knew of the sawdust was when Mr. Morgan and Mr. Ward brought it to my house, and told me where they obtained it. I think that was on the next day after I was down at the house. I think about Friday, September 2d. I was all through the chicken house myself on the day that I was down there. I did not notice any sawdust then. I only made just a casual and general examination. I did not look at the floor of the chicken house for any purpose. I know nothing on the subject of sawdust being there at all.

I made no examinations of the premises at that time for any bullet holes other than the five I have described. I made no examination of the middle fence. Just saw it, nor of the rear of the fence, nor any part of the office, nor of the rear of the dwelling house. I was there in the yard possibly fifteen minutes before I went into the house, and we may have been in the house probably an hour. My total examination of the exterior premises was from 15 to 20 minutes.

The shot in the peaked roof of the privy, the shot in the rear wall of the privy, and the shot ranging downwards at a point north of where the boards were knocked off the fence must have been fired by a person standing in the same place. Three men at three different times could have done so. I mean that the person who fired the shot through the rear of the privy could have also fired the shot through the fence without making a full about-face.

I knew about the size of a man McWhirter was. I could not say about the length of his arm. I knew he was not a large man.

I have been a surveyor and civil engineer. From the point 9 to the rear of the privy would be about $8\frac{1}{4}$ feet. I have no idea of the length of McWhirter's or of an ordinary man's arm. If McWhirter was standing at point 9, the muzzle of his pistol would probably be an inch or a few inches outside the door. The hole in the fence was powder-marked. I did not notice any powder marks on the others. I think it was about three and a-half feet to four feet from the front of the closet to the rear—to the back wall, and the seat occupied a part of that space.

Q. Now, if the muzzle of the pistol would just have been about even with the door of the water closet, when the person who fired that shot from that point, assuming it to have been fired from that point through the rear wall, how far would the same hand have been from the eaves or the peaked roof?

A. About four feet.

I did not accompany the coroner's jury or the other counsel in the case to the McWhirter premises as the inquest was about concluding. I never saw a gunnysack said to have been brought from the McWhirter residence, nor a board with a bullet mark upon it. I was not in the court-room after the coroner's jury left there to view the premises, and was not present when they returned their verdict. I never took any instrument for the purpose of measuring the angle of those shots. I took the angle with lead pencils and judged it.

RE-DIRECT EXAMINATION.

The mask was loose enough to drop over my head before I untied it. I wear a $7\frac{1}{4}$ hat.

From statements made before the coroner's inquest was held, one or both of those osage orange sticks came from near Mrs. Southworth's house.

J. J. Norton, a witness sworn on behalf of the defendant, testified as follows:

Have lived in Fresno a little over two years, and am a locomotive engineer, having been employed by the railroad company for the last twelve years in the San Joaquin Valley.

I lived in Fresno for four or five months before the night that McWhirter died.

Witness temporarily withdrawn.

Mrs. Evangeline McIntosh, a witness sworn on behalf of the defendant, testified as follows:

I have resided in Fresno for the past four years, and resided there at the time McWhirter died, about four blocks from his residence and nearly opposite Dr. Deardorff's house.

I was awake that night. The arrival of a nephew whom I had not seen for twenty years on the train that evening, excited me very much, and we stayed up and talked until about midnight, and I did not retire only on a reclining chair. I was excited and did not feel sleepy, but let the children retire and I sat up by the window. It was a very hot night, and besides the house was full up and I could not find much of a place to retire that night.

A little before three I was startled by three sharp pistol shots right in quick succession.

After the first group there was an interval of perhaps forty seconds, and then another group of three shots. The last shot was a little muffled. Not quite so distinct as the first five. With that exception, they were all alike.

I certainly was wide awake at the time the shooting commenced. What called my attention to the pistol shots was that just after we went to Fresno we opened a school, and I was awakened by three pistol shots at about the same hour of the night, which was the signal for a fire, and found our own schoolhouse was on fire.

I could not be mistaken about the number of shots.

Cross-Examination.

I very distinctly heard the screams of a woman afterward.

J. J. Norton, recalled, testified as follows:

I lived at the corner of M and San Joaquin streets at that time—the east corner—and was at home that night. I was awakened by the shooting. I could not say I heard more than five shots. I thought I heard five shots. After I heard the first shot—I was sleeping towards San Joaquin street, with a window up, and with a screen between us and the street—I raised up and looked out the window and I heard more shooting and screaming, and then I went out on the porch. Probably 15 minutes after the shooting finished I went up to McWhirter's house. I wore the slippers which you show me to go to McWhirter's that morning. I went in this end of the alley-way, went down to Mr.

McWhirter's house, and went in where the boards were knocked off in the back part of his yard. I think I came from the north to the south. I came right out on San Joaquin street and went right down the alley. I probably stayed at the McWhirter place probably half an hour, and I was wearing these heelless slippers all that time. After I got into the yard I examined all the bullet holes I found around there. I examined the bullet holes in the vicinity of the water-closet, and examined them all there. I examined five bullet holes.

After getting there about fifteen minutes after the shooting ceased, I went in where those boards were knocked off, right along here some place (showing). I walked all around in this part of the part of the yard where the bullets were fired. Then I walked up as far as the back part of the house, and back again. I then came back into the alley and went towards Calaveras street, and went home. I went home back the way I came—through the alley. It is north from the McWhirter house, through the alley. The streets run rather north—northeast and southwest.

Referring to the manner in which the shots came, I think I heard two, then a space, an interval, then two more, and then another interval, and then another shot. During these intervals I heard a woman scream. I heard her say something. I could not tell what it was she said. I heard her say, " O, papa, papa," like that. But I could not distinguish what the words were further than that. I could hear " O, papa." I could not understand the rest of the words—they were rather faint, and then commence and go over it again.

It sounded like some one pleading to somebody else. I could not say the exact words. I can't say that I heard any other words.

It was about fifteen minutes after the last shot was fired that I got to that alley. I went out and stood on the porch quite a little bit before I went over there.

Standing on the porch I could see the alley. It was not more than thirty seconds, I guess, from the time the last shot was fired until I got out on the porch. The night was very calm and still. I heard no other noise than the shots, and the groan, screaming, or pleading. I heard no one run up or down the alley.

After the shots, and after I got out, and after the lady had been screaming, I saw a good many people going to the McWhirter residence. I did not see any running. They were walking. I could hear their footsteps, and see them also.

CROSS-EXAMINATION.

Those slippers which I wore measured $11\frac{3}{4}$ inches in length.

When I got over to the house there were several people there, but only one that I knew. Before I got to the house I met Babcock and Charles Packard in the alley. They were looking for tracks to the north of the alley. As I was going into the alley, they were coming up the alley toward me. They said they were looking for tracks. They were not following any tracks. They turned and went back with me. I entered the yard through the hole in the fence where the boards were knocked off.

I did not go into the house. The body had been removed into the house before I got there. I walked

around to see what I could see. All the people that I saw going to the McWhirter house were going there from the north. I don't think there was any wind that night. In the alley I went south to a kind of woodshed or woodhouse just below the McWhirter place. In going home I went to the north.

RE-DIRECT EXAMINATION.

The parties looking for tracks in the alley did not find any while I was there.

Mrs. Bell Norton, a witness on behalf of the defendant, testified as follows:

I live on the corner of M and San Joaquin streets, in Fresno, and was living there at the time of Mr. McWhirter's death. I remember that morning. I was awake at the time of the shooting, and had been so for some time before the shooting. I know that because I heard the train go through. I knew the train time, and I had not been asleep since.

I am the wife of the gentleman who was just on the stand, and, as he is a railroad engineer, I know the time of the arrival and departure of the trains.

The night on which he was killed was a calm, quiet night. Prior to the shooting, or the noise of the shots, I did not hear any other noise. I did not hear any noise as if someone was pounding on a board, or anything of that kind. My window was open that night. I am not sure as to the number of shots. They came from the south. There was an interval between the shots. I heard one shot, then the two that way (clapping hands), and

then there was an interval between them. I am indefinite about the number of shots after the first three, but I know I heard the first three. After the first three shots I heard a man's voice make an exclamation of some kind. I could not tell what it was, and then a woman's voice screaming. I heard her say "O, mother," and ask some one to come to her, and she asked why this had been done in some way. I don't know whether she said why did you do it, or why it had been done. My best impression was that it was a woman's voice asking why her father had shot—why he had done this. I heard the word "Papa" used, and that is why I thought it was a woman's father that had done the shooting. During the shooting I put my elbow on the window sill. I was right in front of it, and remained in that position all of ten minutes. From where I was I could see the alley which runs back of Mr. McWhirter's house. It was light enough for me to see anyone who might have entered or come out of the alley by that way, and I did not see anyone. I did not go over to the McWhirter place. My husband did.

Cross-Examination.

I live 375 feet from the McWhirter residence, and I never went nearer than that distance to the WcWhirter place on that night. I am certain I heard the man's voice before I heard the female voice. If there was any screaming or calling out by a female voice befere I heard the man's voice I did not hear it. I do not think it possible there could have been a whole series of screams before I heard any of them. I am just as certain as

anything else that I have testified to that I heard the voice of the man before I heard the female voice at all. I heard the man's voice after either the second or the third shot. They were so close together I could not tell you. I did not hear what the man said. His voice was not pitched in a loud tone. I don't think it was Tom Rhodes' voice that I heard. I thought the voice came right from where the shots did.

The train I heard before the shooting was a southbound passenger train. I don't know what time the southbound train passed through Fresno that night. I know positively I heard it go through, and had not been asleep from the time it had gone through. There was a northbound passenger train which pulled out just after the shooting, or while it was going on. My husband called my attention to it. It was after the shooting had commenced. I am certain that the 3:20 northbound train was not the first train I heard. I don't think the man said words. It was an exclamation of some kind, "O," or something of that kind. It was a sound of distress—that is, I would imagine it so. I don't think it was a groan. I heard no groans that night.

I am sure I did not hear the woman say "O, papa, why have they done this?" I am not sure as to what the language was. The reason I have an impression that she said "O, papa, why has this been done!" was because I did not know any one that lived there, and when the woman made an exclamation I said to my husband, "Get up, there is a man hurt." I said "Listen to that poor woman scream—get up and see where it is."

First he said it was some family affair, and he did not care to get mixed up in it. Then he said, "I think some fellow has staid too late and the father is after him with a shotgun." I thought it was some woman pleading with her papa, and asking him why he had done this. That is why it impressed it on my mind so.

I did not testify before the coroner's jury or in the trial of R. S. Heath at Fresno.

Mr. McFarland is the first person I communicated my knowledge on this subject to. I have talked it over with a great many people. I suppose myself and husband have talked it over to the neighbors. I did not tell Mr. Bury what I knew or what I thought. Bury came to me and asked me regarding the slippers that my husband wore. I don't think I ever said anything about what I knew to any one on the side of the defense. I did not expect to be brought in at all. Mr. McFarland was the detective employed by Mrs. McWhirter. Mr. Phil Scott came and asked me about it after the coroner's jury, and before the trial of Richard S. Heath. I was never subpœnaed to tell what I knew about it.

Crittenden Thornton, a witness sworn on behalf of the defendant, testified as follows:

That is the bullet that was picked out of the small board in the corner of the chicken house (showing.) This one (showing) was one of two or three bullets which was cut or sawed out of the skirting board either in the passageway between the chicken coop and the shed or at the west of the chicken coop. In the base board. The flat and battered bullet is the one

that was taken out of the corner. And the other one, which is somewhat battered, is one of two or three that were taken out of the base board north of those others. The board in which this flat bullet was found was a pine board of from $7\frac{1}{2}$ to 8 inches in width, about one inch in thickness, and from $2\frac{1}{2}$ to 3 feet in length. It was not a part of any other board, it was an individual board, but there were other boards there which formed the continuation of that board, put upon the fence for the same purpose. I do not think it was a piece of a box.

The hole upon the south side of the sack, that is upon that portion of the sack which was nearest the middle fence, was between the size of a silver five-cent piece and a ten-cent piece. The other hole was of irregular size and shape. It was not round. I do not pretend to say that it was as small as a five-cent piece or that it was not as large as a ten-cent piece.

W. P. Thompson, a witness sworn on behalf of the defendant, testified as follows:

I resided in the house of McWhirter some time after his death. The board in which this battered bullet was found was a pine board. I don't think it was part of a box—it may possibly have been, though. My recollection is that it was a board placed there to cover a hole in the base-board. It was nailed on.

CROSS-EXAMINATION.

As to that board of which I speak being a base-board, I do not make any assertion either way. I only give my recollection. My recollection is that that board was put there to cover the hole, and that there were some other boards that joined along under

that stringer. My recollection is that there was another board put behind it, and that is what makes me think it was put there to cover a hole, because there was a hole there, as I recollect.

RE-DIRECT EXAMINATION.

The hole was large enough for a chicken to go through. That board was taken into the house, and taken away before the coroner's jury was brought there, and then was brought back. When you (Mr. Budd), Mr. Thornton and I were there, it was placed there for the coroner's jury to view, with the bullet in it. The bullet was discovered on Wednesday, or Thursday, the 8th of September, at 10:40 o'clock in the forenoon.

RE-CROSS EXAMINATION.

The board was simply removed into the house to preserve it. Nothing was changed except the position of the board, and then it was taken back again and placed in the position in which it was originally found.

Mrs. W. N. Rorer, a witness called on behalf of the defendant, testified as follows:

I have lived in Fresno for the past six years, and at the time Mr. McWhirter died we were living on the corner of L and Calaveras street, and slept on the side next to Mr. McWhirter's house, with the windows open. I was awake at the time of the shooting. I had been up with my children and had just gone to bed, but did not sleep. That night I heard the shots —I could not tell how many—and heard Mrs. Mc-

Whirter scream. That is all I heard. When I heard the shots I did not hear any other noise in Mr. McWhirter's back yard, and I did not hear any other noise afterwards in Mr. McWhirter's back yard or in the alley. I cannot tell you just what I did when I heard those shots. I was very much excited. I ran to the back door and then to the front door, but did not go outside. The inside door was open. They had screens on them. I think I was awake about an hour before the shooting occurred. During that entire night before the shooting I did not hear any noise in the back portion of my house or Mr. McWhirter's yard, or the back portion of my yard. I did not hear any knocking off of boards. It was a quiet night, as I remember, and I don't think I remember of hearing anything. I did not hear any person running away from there after the shooting. Back of my house there is a barn and woodshed, and the house between my house and the McWhirter residence was vacant, and the barn and shed unoccupied. Two or three nights before I heard a noise in the back of my house, which sounded to me like a horse kicking. We went out. I heard a noise as though it might be the horse kicking, or making some disturbance, and we went out to see about it.

That was two or three nights before the killing of Mr. McWhirter, between ten and eleven o'clock. It sounded like a horse kicking against the barn.

I know Mrs. McWhirter. I saw her on last Saturday evening. I don't remember what she said. I don't think she said anything about my not testifying. I don't think she said anything to the effect to say nothing against her in this case.

CROSS-EXAMINATION.

I testified at the coroner's inquest that I heard the horse neighing, and a sound like the back gate shutting, and a noise like someone walking around. I suppose my recollection of these sounds was better at the time of the coroner's inquest than it is now. I supposed the noise was in our back yard. I testified at the coroner's inquest, "I think I heard seven or eight shots." As near as I can remember at first I thought it was more than six, but I did not count them. I said I heard three in the first place, and after that I did not count them.

I don't remember hearing any train going by on the railroad that night.

RE-DIRECT EXAMINATION.

I testified at the coroner's inquest: "I could not tell how many shots had been fired before I heard that (sound from Mr. McWhirter). I was so excited."

I recollect now hearing "O" in Mr. McWhirter's voice after the interval, as near as I can remember.

WILLIAM DAVIDSON. AT INQUEST.

The testimony of William Davidson, given at the coroner's inquest, was then read in evidence by the defendant, as follows:

My house is right opposite where McWhirter lived. That morning I heard the shot, and immediately after the shot I heard a noise as if a man was in distress—something like that "O," or some such noise as that, and right after the first shot, probably a second or two, I heard three more shots in quick succession, and then I heard a woman scream, and two more shots

after that, and just about a second after that I heard a woman, "O, Mr. Davidson, Mr. Davidson," and my wife said that is Mrs. McWhirter's voice, so I jumped up and put on my pants and coat and a pair of slippers, and rushed over there and saw Mr. McWhirter lying on the ground and Mrs. McWhirter bending over him, so I went to Dr. Pedlar's, and found he had gone, and right there were Officer Babcock and some other officer, and we went back together.

I don't think I was awake before hearing those shots, and I did not hear any other noises of any kind or character before I heard those shots. I heard the first shot and immediately after the first shot I heard somebody as though he was in distress—"O, O," as if a man was in pain. And then I heard three other shots. I heard six shots distinctly and counted them as I heard them.

Wm. N. Rorer, a witness sworn on behalf of the defendant, testified as follows:

I have resided in Fresno for the past six years, and am the husband of the last witness on the stand. At the time of McWhirter's death I lived at the corner of Calaveras and L streets. Some three or four nights before Mr. McWhirter's death my attention was drawn by my wife to some noise in the back portion of the premises, and I went out to find out what the noise or disturbance was, and I found nothing, everything was quiet, and I saw no one going away.

On the night of McWhirter's death I was sleeping on the north side of my house with the windows all open. Was awakened during the night by a shot, and more shooting and loud screams, and general noise

and confusion. Before the shooting was entirely over, I began to dress to go out. I started to count the shots but lost them before it was all over. I could not tell how many shots there were, accurately. There was one shot, a small pause, then two more, a longer interval, then three or four more—I could not tell how many there were. The woman was screaming during the last shooting.

I did not hear any noise that evening in the back portion of McWhirter's premises or of my own, nor any knocking of boards off, or talking, or anything of that kind—nothing at all. I went out the front way to McWhirter's.

CROSS-EXAMINATION.

I lost the number of shots before the shooting was over. I was asleep when it began. I first heard the screams during the interval. I was not awake prior to the commencement of the shooting, but I don't think I had been sleeping very soundly. I think I heard the first shot distinctly—at least I thought I did.

John S. Eastwood, a witness sworn on behalf of the defendant, testified as follows:

On the night of McWhirter's death I was residing at the home of A. M. Clark, and went over to McWhirter's some minutes after the killing. Got there before Officers Babcock and Welch. In going over there I went through the gate south of the windmill. Mr. Rorer and Dr. Cooper at that time came in at the south gate of the Clark residence and passed out of the rear gate by the windmill, went right up the alley

and I behind them. We could not get in the gate, and they went through the opening in the fence, and I opened the gate, reached over the latch.

CROSS EXAMINATION.

I was asleep when the shooting began. The sound of shooting and the sound of screams came in close together.

There were no other people in the alley at the time we went through there, but a short time after there were quite a number going up and down the alley.

Thomas Bury, a witness sworn on behalf of the defendant, testified as follows:

I have been a detective for the past seven years. I was in Fresno on the night of McWhirter's death, having got in on the night train. A few days after I was employed by the county and worked under the instructions of Deputy District-Attorney Welch for 12 or 14 days in Fresno. There was 25,000 dollars reward offered for the detection of anybody who killed McWhirter. I was employed by the county and the citizens.

I went to the McWhirter residence on the 29th of August, and made a slight survey of the premises, and then went away. I think it was on September 1st I went down there again, when I made an investigation as regards the location of the shots, and went into the house and had an interview with Mrs. McWhirter, Mr. Hensley and Mr. Welch being present. We found five bullet holes. A man could stand in the front of the water closet and have fired the shot into

the rear of the water closet, up in the eaves, and the one down below in the fence. The one in the fence near the water closet was powder marked. There were two more bullet holes north of the water closet, in the fence. They went outward through the fence. We found one hole in Clark's fence on the other side of the alley.

After examining the premises on the outside, we went in and had an interview with Mrs. McWhirter and the hired girl, and then made an investigation of the chicken yard, and in here, in what is marked hen's nest on the map, we found a carpenter's saw similar to the one you show me. There were fibers of yellow sawdust on it. Mr. Welch handed it to the sheriff, and the next time I saw it was in the district attorney's office, and it had those fibers still on it. A carpenter was called in and the saw passed over to him, and he picked off the larger pieces of the fiber with a penknife, and took a brush and brushed the balance of them off, and they were put in a vial. There was some sawdust found in the hen's nest at another time by the city marshal and myself. The sawdust found on the teeth of the saw was yellow dust. I went to the McWhirter premises altogether two or three times. When I was there with the marshal we noticed a little sawdust on the edge of the hen's nest, and some that had dropped on the floor and also in the nest; also marks of a saw there. We gathered that up and took it to the district attorney's office, and sealed up in a vial. There were some feathers in it. The sawdust in one vial was the sawdust taken from the teeth, and the other from the hen's nest.

(Vials offered and admitted in evidence).

In endeavoring to find a place from which those clubs had been cut, I found that there had been some osage orange trees lying in a lot north of Mrs. Southwood's house. Mr. Ward was with me. It was in the middle of the afternoon. I raised the piece up that had been lying there for a while and commenced to saw a piece out of it, when a cow came up and bothered me by rubbing her nose against me, so I dragged the piece probably 10 or 15 feet, I think, clear to the fence and sawed the piece off. That piece which you show me, marked Bx looks very much like the piece I sawed off. I took the piece to the jail and kept it in a room there. I did not draw the limb from which I sawed the piece off back to the place in which I originally found it. On the last day of the inquest I went to the lot next to Mr. Southwood's with the coroner's jury, and found that the tree had been taken from the place where I left it to the place where it was originally located. I do not know who did this.

When I was at the McWhirter premises, when Mr. Thompson, you and others were there, I took a steel tape-line down there. There was considerable comment about a sack that was tacked up against the middle fence, and we measured through that hole to get the angles.

The board in the chicken yard had been taken off when I got there. There was a bullet imbedded in the board. It was not a very large bullet. It seemed to be flattened some. It was very black, and an old shot.

We searched along the base of the north fence of the chicken yard and found quite a number of bullets there—I do not now recollect how many—some of which were cut out at that time.

The small hole was about as large as the end of a pencil or something of that kind. I did not pay particular attention to that hole. There was a large hole on the other side. We did not do anything particular to enlarge that hole. We ran a tape-line through it, and possibly that might have enlarged it somewhat. I did not do anything intentionally to enlarge it. Mr. Thompson or Mr. Thornton made no objection to putting that tape-line through the hole at the time. I do not know what became of that board and sack. A line between that hole in the sack and that bullet in the fence would come into this chicken-coop here. The line struck the corner of this movable coop. Several members of the coroner's jury and myself ran this line. If the bullet had gone through there straight it would have struck the corner of this coop at point 4 (showing). I don't think the hole in the sack was over 18 inches.

CROSS-EXAMINATION.

My first definite engagement was in the afternoon or about noon of the 29th of August. The county of Fresno paid me for my services in this matter. I definitely embraced the theory of suicide on the last day of the inquest. I think my employment by the county ceased about ten days after the inquest. About the middle of April I was employed by the defense in the Heath case, somewhere along there, and I remained in Fresno until the evidence in that case was all in.

Q. You were in constant consultation with the attorneys for the defendant (in the Heath case during the trial?)

Mr. Campbell—We object as immaterial, incompetent and irrelevant.

Objection overruled and exception.

A. Yes, sir.

I was present at the coroner's inquest a part of the time.

On that saw marked H. H. W. there is a tooth that has been flattened somewhere. Here is the tooth, 7⅞ inches from the end on the right hand side of the saw.

I cannot observe any tracing of repairing or setting or refiling that saw since I first saw it. I think that is the same saw.

(Admitted by the plaintiff that L. B. McWhirter arrived at the Palace Hotel, in the city of San Francisco, on the forenoon of Sunday, June 5th, 1892, and that he left the Palace Hotel on the afternoon or evening of Wednesday, the 8th day of June, 1892.)

Mr. Bury—At the time I went to the McWhirter premises with Mr. Welch and Mr. Hensley, there was a piece of rope hanging to that post.

I did not make any examination of the middle fence for bullet holes. I would not swear that the holes in the gunnysack were bullet holes. The board in which the bullet was imbedded is a pine board about a foot wide or a little more. The bullet was a very black bullet—a very old shot. There was a rip or scar made by the bullet. The bullet was not far from the center of the board according to my recollection, and was flattened somewhat. The bullet was smaller than a 41 and declared to be a 32. I don't remember how high the stringer was above the ground.

I sawed that bough or branch of osage orange two or three hours before sundown. I don't think any member of the coroner's jury or any one else asked me to point out the place where I had sawed that branch or bow of osage orange.

My impression is that I placed a handkerchief or a piece of paper under the bow of osage orange that I was sawing, in the first place, but I did not catch any of the sawdust owing to the friendly cow that was in the way.

Mr. Welch took the saw off of a nail in the chicken-house. This was before I sawed the branch of osage orange in the lot next to Mrs. Southard's.

Re-Direct Examination.

There were several other branches of osage orange scattered around in that lot.

Henry Steel, a witness sworn on behalf of the defendant, testified as follows:

I am a merchant tailor. I knew Mr. McWhirter, and he dealt with me in the year 1889. He was in debt in February, March, April, May, June and July of 1889 to the amount of about $200, which was paid in 1891 as follows: June 9, $25.00; February 17th, $125.00; June 20th, $10.00; November 6, $140.00. It was overdue, and this includes interest. This was paid through my attorneys in Fresno, Tupper & Tupper.

G. H. Bernard, a witness sworn on behalf of the defendant, testified as follows:

I have lived in Fresno for the past twenty years, and was a member of the coroner's jury that inquired

into McWhirter's death, and went to the place with the rest of the jury. We found a sack on the fence, about 10 or 15 feet from the back gate. There was one large hole in the sack about the size of a 20-cent piece or a two-bit piece, and there was one or two small holes down near the bottom of the sack to the left. There was also a bullet shown in the fence in the chicken yard. It was in a board, I should judge, about from 3 feet to 3½ feet long. It was a small bullet, and near the baseboard of that west fence, underneath the stringer. The bullet was an old bullet, with two or three little scratches on it as though marked with a pin or a penknife, and a little flattened on one side. It was an old hole and an old bullet. We found four or five bullet holes in the fence, and I think that you, yourself, picked out one or two bullets out of the fence. Mr. Bury had one of those tape lines, and he and I and Mr. Fuller, the foreman of the grand jury, drew a tape line from this hole in a direct line, and we could not hit that bullet, because it would have gone into this coop, or pig pen, or obstruction there of some kind. The obstruction was there when I got there.

The hole in the sack was a pretty good-sized hole, and my idea at the time was that chickens had picked holes in the sack. We also examined the holes in the closet and in the fence there. I also went into the vacant lot with Mr. Bury to inspect a tree that was there, out of which Mr. Bury explained he had cut a piece. We did not find any sawdust there.

There was no attempt made to enlarge that hole in the sack with the tape line while I was there. I think

Mr. Thornton made some objection to the sack being taken off the fence. I don't remember anything being said about the board. The coroner took the bullet out of the board.

Cross-Examination.

Q. Did you hear Mr. Phillip Scott, a member of that coroner's jury, at that time and place, ask any person to point out where the sawdust was, which was made in the sawing of these limbs?

A. I don't know. I don't remember it. There was something said about sawdust, because you were there at the time.

Q. Was something said about sawdust?

A. Yes, sir.

Q. What was said—by whom and to whom?

Mr. Campbell—I object to the question as not cross-examination.

The Court—He testified there was no sawdust there in his direct.

Mr. Campbell—But what Mr. Phillip Scott said is not cross-examination.

The Court—I think perhaps his attention may be called to what was said about sawdust in connection with whether or not there was any. I think the question is proper.

Mr. Campbell—Exception.

A. Some one said where is the sawdust; I think that you said where is the sawdust.

Q. What, if anything, did Phillip Scott at that time and place say about sawdust?

Mr. Campbell—Subject to our objection and exception.

A. I don't remember whether Scott said this or no. I do not deny that Scott said so. I have an idea you inquired where is the sawdust. I don't think Mr. Bury found any sawdust where the limb was sawed. He told us at the time that there was a cow that interfered with him, and he went over to the fence and sawed the piece out, and left the limb there.

The large and small holes in the sack were from 15 to 20 inches or two feet above the ground—something like that. I think we had to stoop down to see the bullet in the board. The rip or scar outside of the bullet I should think was $\frac{3}{4}$ of an inch or something of that kind. Maybe an inch and a half. I think the scar was old. The bullet was a small bullet stuck on that board. It looked like a piece of gum to me as it was in the board. It was just in a very little distance.

RE-DIRECT EXAMINATION.

When the coroner's jury got to the vacant lot the tree was in the old rut, which was about 30 or 40 feet from the fence, as a guess. Some one made a remark that there was no sawdust. Mr. Bury told us that on account of a gentle cow interfering with him, he went over to the fence. I don't remember that Mr. Bury was asked by any of the coroner's jury to show the place where he had sawed the branch or bough of osage orange.

T. L. Reel, a witness sworn on behalf of the defendant, testified as follows:

On the night of the death of Mr. McWhirter I was stopping at the Pleasanton Hotel. I was awake when

the shooting commenced, and had been so for some little while. I heard three shots, and then a little pause, and then three more. In all I heard only six shots.

I am satisfied that the bullet in the board had been there for several months. I examined it very carefully. There were some fly specks there, and the appearance of the wood was dry. The sack was a very old sack, and rotten, apparently. I could not tell whether it was a bullet hole or not.

When we were in the lot north of Southworth's with the coroner's jury some one made a remark that they could not find the sawdust there, and the detective said I did not see it there. A cow bothered me or hooked me or something of that sort, and I took it over to the fence.

CROSS-EXAMINATION.

I think the plank in which I saw the bullet was six inches in width and about three feet long. The scar in the board was about an inch in length and about a quarter of an inch wide. My eyesight is not very good. I cannot read without glasses. We looked at that scar for several minutes.

The hole in the sack that I supposed to be a bullet hole was, I think, about an inch large. There were to my recollection several holes in the sack, I don't know how many, three or four. I could not see any difference in the holes. Both holes in the sack, the one on the inside and the one on the outside, were the same size.

RE-DIRECT EXAMINATION.

I heard a man's voice just about the time the shooting ceased, and just before a woman's voice. The coop

that I say would have been hit by the shot from the sack to the board was about three or four feet square, probably a little longer than it was wide.

W. L. Seaver, a witness sworn on behalf of the defendant, testified as follows:

Since 1887 I have been the representative of the Colt's Arm Co. and the Union Metallic Cartridge Company in San Francisco. The pistol, Exhibit No. 5, which you show me, No. 88,031, is a double-action 41 revolver, 4½-inch barrel, blued. I have a telegram to the company and also their reply in regard to this pistol. I will read the telegram I sent to them on September 1st. This is my copy of it.

Mr. Thornton—We object to that as purely hearsay, and not the proper way—an inquiry made of a third person, his reply is not the proper method of proving a fact.

Objection sustained and exception.

The following are the documents excluded by the court:

San Francisco, September 1st, 1892.

Colt's Patent Firearms Company, Hartford, Conn.

When and to whom did you invoice 41 double-action revolver No. 88,031? Answer by telegram immediately.

Colt's Patent Firearms Company.

Hartford, Conn.

To Colt's Arms Co., San Francisco, California.

88,031 sent you May 5th, 1892.

Colt's Arms Co.

Q. Can you state to this jury whether or not, in the month of May at any time, you received an

invoice of pistols similar in kind and character to that which you now hold in your hand, and if so, how many?

Mr. Thornton—We object on the ground that it is too remote.

Objection sustained and defendant excepts.

Mr. Campbell—I will ask you whether or not you delivered to the firm of Clabrough, Golcher & Co. on the 7th of June, 1892, any pistols of the kind and character which you hold in your hand, the exhibit of which I have asked you?

Mr. Thornton—The same objection.

Mr. Campbell—Q. That is a 41-caliber, 4½-inch blue, double-acting Colt's pistol, with side ejector?

A. Yes, sir.

Q. Now then, I will ask you whether or not, on the 7th day of June, if you can tell, you sold and delivered a pistol, exactly similar in kind and character, to the firm of Clabrough, Golcher & Co., in the city of San Francisco, who have their present business in the Grand Hotel Building, between New Montgomery and Second streets—that is within 500 feet of the Palace Hotel.

Mr. Thornton—We object to the question upon the ground that it comes within the former ruling of the Court.

Objection sustained and defendant excepts.

Mr. Budd—We offer in evidence the testimony of Mrs. McWhirter. It is admitted that the Convention was held in June—June 17th, 1892—that is, the State Democratic Convention.

Mr. Thornton—We object upon the ground that the evidence does not refer to the subject which you indicate.

Ruling reserved by the Court.

E. F. Bernhard, a witness sworn on behalf of the defendant, testified as follows:

I am an attorney-at-law and treasurer of the Fresno Loan and Savings Bank, and have resided in Fresno for about twenty years. Knew Louis B. McWhirter from the time he came to Fresno, and met him in a business or political way almost every day. I was friendly, but so far as social relations went we were not intimate. I attended a banquet with him about four years ago, or perhaps the campaign preceding that. It was held at Mr. Grady's house. I returned from that banquet with Mr. McWhirter.

Mr. Campbell—Q. Did you have any conversation with Mr. McWhirter in returning from that banquet in relation to suicide, or anything of that kind?

Mr. Thornton—We object to that, if your Honor please, as too remote. If it was not the campaign of 1890, it was at least 20 months before the death of Mr. McWhirter. And if it was not the preceding gubernatorial election, it was at least six years before the death of Mr. McWhirter.

The Court—This is an important question. You may take a little time to investigate. You may withdraw this witness, and go on with the case. (Witness temporarily withdrawn.)

D. L. Davis, a witness sworn on behalf of the defendant, testified as follows:

At the time of McWhirter's death, I was superintendent of construction of the Courthouse at Fresno. About that time I saw in the District Attorney's office a certain saw that had apparently been run against a nail, and had jagged the teeth on one side of it. That is the same saw (showing). At that time I made an experiment with the saw in fitting the teeth in two pieces of osage orange wood. Those two pieces marked "Ex. No. 7 and 8 Heath," seem to be the pieces to which I fitted the teeth of the saw.

Mr. Budd—Q. I will ask you whether or not in that saw at that time there was a tooth that fitted into the cuts or curves of this osage orange?

The Court—That is a matter which the jury can determine. Is the saw in the same condition—can you determine whether the saw is in the same condition now as it was then?

It looks to be nearly the same. Yes, sir. I don't see any material change in the saw.

The Court—What is your question, Mr. Budd?

Mr. Budd—Whether or not, at the time when he was called in by the district attorney of the county, he made an examination of the saw and fitted the teeth into these cuts or curves in this osage orange, where it had been sawed?

(Saw examined by the Court.)

The Court—I think the jury can view that as well as any expert. This is out of the range of expert testimony. (The saw and the clubs were then handed to and inspected by the jury, and they were allowed

to make their own comparison of the teeth of the saw and the edges of the club.)

Mr. Budd—We except to the ruling of the Court.

Mr. Campbell—Does your Honor rule that this witness could not take them and show how he fitted them in at that time—that this witness is an expert, and that he cannot testify what he then saw, and show to the jury now how he did it?

The Court—I think the jury can do so as well as he can. Any man can fit them as well as a carpenter can.

Mr. Budd—We offer to prove by this witness the manner in which he fitted it, and the result.

Same ruling and exception.

When the District Attorney showed me that saw there was some sawdust in the teeth. I cannot tell you positively what kind of sawdust it was. It was of a reddish color, or perhaps of a yellowish nature. It was not compared with any other sawdust at that time to my knowledge. The sawdust was put into some vials, I think. The color was nearly that same color, as I remember it. A portion of it was a color of the heart, and a portion the color of the white wood.

I think Exhibit No. 8 is the same club.

CROSS-EXAMINATION.

I don't think I could tell the weight of the sawdust. It was a very small particle, I know, perhaps four or five grains, something like that. I examined the saw some days before the coroner's inquest. It would be very hard for anyone to say it was possible or positive to identify the sawdust produced from wood by the

quantity which was found upon the teeth of that saw. I used a microscope or lens for my examination—about an inch and a half. It is the medium size, I think. I am familiar with the grain and color of dry peach, dry mulberry, dry sugar pine, dry white pine, and dry yellow pine. I could not say that the sawdust which I found on the teeth of that saw did not belong to white pine, or sugar pine. I don't think it was mulberry.

James A. Ward, a witness sworn on behalf of the defendant, testified as follows:

At the time of McWhirter's death, and the inquest on his body, I was Deputy Constable in Fresno. I think I heard about his death at about 7 o'clock on Monday morning. I dressed myself as soon as possible, and went to the house and in the yard, and examined the outhouse and fence. I stayed there probably about half an hour, and then went to the Sheriff's office. I saw five bullet holes—three in the fence and two in the closet. There was one shot about two feet above the seat of the closet, and one outside the closet in the eaves, and one in the fence. There were two boards knocked off about here, and there was one bullet hole just this side of that hole, and that was powder-marked. Then over I should judge about 15 feet from the closet there were two holes in the fence. They were the only bullet marks that I saw. I examined the back of the house and the back of the fence, but did not find any there. I found a hammer in the cellar, and a hammer in the woodshed. In the chicken house or in the cellar way at this time—I

don't remember which place, there was a little box with a lot of shingle, sixpenny, and all kind of nails. They were nails that had been used for something, and then pulled out and put in this box to save them. Then I found some more nails in the office in the yard, that had been dropped by the carpenters, I suppose, in building the house. The nails which you show me, I believe, are part of the nails that I picked up to bring down to the courthouse. Exhibit 21—I compared those nails with the nail in the club, and it was the same kind as some of the nails in the club, and they were all rusty. I went into the chicken coop or chicken house and saw some marks on the nests put there for the chickens, and across the front and side of one of them there were the marks of a saw. I saw no sawdust there, and I think this was after the sawdust had been removed. The saw marks were on the second nest from the corner, and were not over an eighth of an inch deep, just as though you would catch a block and the tail of the saw would catch sometimes. Mr. Winchell and I also found some clothes line hanging on this clothes post in the yard, and we took what there was hanging on the post. It was a white cotton line. The outside of the rope was weather-beaten, the ends being pretty clean, as if a piece had been cut off. It looked like the piece which you show me. We compared this rope and the rope found on the club, and from the comparison I believe they were the same rope. I did not see the board with the seventh bullet in it.

There were about thirty hammer marks on the boards, and were close to the bottom, where the board

had been nailed on to the stringer, and above the top stringer.

In the yard next to Mrs. Southwood's Mr. Bury and myself found some osage orange, and got a saw from the soda works, and cut a piece out of this piece that laid in the yard. This was about three o'clock in the afternoon, and I know it was not later than four. At the time we were cutting that Mrs. Southwood and another young lady were present—I don't know whether it was her daughter or not. Bury started to cut it, and a cow interfered with him, and I told him to pull it over to the fence, which he did, and cut it there. I know that he did not take up any sawdust at that time. We took the pieces to the sheriff's office.

I was working for the county at the time and wanted to get the $35,000 reward. I was pretty diligent.

CROSS-EXAMINATION.

I was a constant attendant and a witness at the coroner's inquest in this case. I believe the hammer which you show me is the one I found in the cellar and took to the sheriff's office. I compared the hammer with the marks on the board at the sheriff's office.

Some of the marks on the board were made by a round-headed hammer, and some by an octagonal-headed hammer, and on the other board marked No. 10, Heath, they are made by a round-headed hammer. I worked at carpentering for some time.

I did not see Bury take a piece of paper or handkerchief out of his pocket for the purpose of catching the sawdust.

Mr. Campbell—In order to save time, we will offer to prove by Mr. Golcher of the firm of Clabrough, Golcher & Co.—something similar was asked of the witness Seaver this morning, that the pistol was received by them on the 7th of June, from the agent of the Colt's factory, and sold on that day.

Mr. Thornton—Objected to on the same ground—on the ground of indefiniteness and remoteness.

Objection sustained and exception.

Mr. Ward—I don't know that I can come forward and pick out the rope found on the McWhirter place, but I belive that is the piece—the longest piece. It was taken from the post right at the lattice work. I know of but one piece being taken away from the premises, and Mr. Winchell took that, I believe. I compared this rope with a piece that John White brought there. That is the only comparison that I know of.

I could not tell whether the hatchet had six or eight sides.

Mrs. J. S. Eastwood, a witness sworn on behalf of the defendant, testified as follows:

I have lived in Fresno for the past eighteen years, and am acquainted with Mrs. McWhirter, but was not acquainted with her husband. I knew him by sight for a short time before his death. I was not intimate with her.

In the month of August, 1892, I lived at A. M. Clark's house, just back of the alley. I was there on the morning of McWhirter's death, and was awakened by the shooting. I don't know how many shots

were fired. About nine o'clock that morning I went to the McWhirter residence, where I found Mrs. McWhirter and quite a number of other ladies. I remember Mrs. McWhirter spoke of the very happy time she had had with her husband that summer in the mountains and all the pleasure he seemed to take with his little boy and wife during that summer. I also remember that she stated that he seemed unusually affectionate to the boy that Sunday evening before his death. She said in the morning it seemed to her that he must have had a presentiment, he seemed so affectionate with the child, although he always was affectionate, but unusually so that evening. There was other conversation, but I don't recollect it.

The Court—I have considered the question that was submitted yesterday on the introduction of evidence which proposes to show by the witness Bernhard that he had a conversation with the deceased at one time in which reference was made to another person whose word and reputation were in a very bad condition, and it is attempted to be shown by the witness that the deceased remarked concerning that other person, that if he were reduced to such a condition, or were in such condition, he would take certain action and do such and such things. The objection to that testimony is sustained.

Mr. Campbell—I think I can fix the time. Please call Mr. Bernhard.

The Court—It is fair to counsel to have the record show at what time it was.

E. F. Bernhard—Re-called for defendant. To the best of my knowledge and belief I had the conversation with Mr. McWhirter, of which I spoke yesterday, in the spring of 1889.

Mr. Campbell—Q. I will ask you whether or not in the spring of 1889 you had a conversation with the deceased, L. B. McWhirter, in relation to suicide, and if so, what that conversation was.

Mr. Thornton—Same objection, upon the ground of remoteness, immateriality, that it opens up collateral issues, a comparison of the merits or demerits of a third person, and four years before the contract was made—three years, rather.

Objection overruled and exception.

CROSS-EXAMINATION OF MRS. N. S. McWHIRTER

At the trial of Richard S. Heath, was then read in evidence as follows:

You cannot ring the bell from the inside. The sound came from ringing the bell on the outside. It is about three feet from the floor.

I said I thought that the pistol my husband took from under the bed that morning he had since May or June. The first time I became familiar with the pistol was in the mountains.

Before we went to the mountains I remember noticing the pistol lying on the stand, and once I took it out from under the bed, and laid it up, sometime during that time. I just laid it on the stand in the closet.

My husband had a pistol all the time, but the first time I ever saw that pistol was in May or June.

I do not know where my husband got that pistol. I think that he bought it from Mr. Warnekros, as he usually dealt there, but I am not sure about it. My husband was in San Francisco in June, for some days. I am positive that he did not buy that pistol there at that time, because he had a pistol in his office during the convention. He had a black pistol. I presume that is the same one. He had two pistols, one of which he gave to my brother after he got into the mountains.

W. R. Lambert, a witness sworn on behalf of the defendant, testified as follows:

I am clerk of the Oakland Police Court. The papers marked 4225 of the Police Court, in and for the City of Oakland, are a part of the record of my office, as well as the City Criminal Docket No. 2, Police Court, City of Oakland, particularly 566 and 567.

Mr. Campbell—I now offer in evidence a complaint against the deceased, Louis B. McWhirter, sworn to on the 15th of March, 1892, charging him with a crime—I offer in evidence the warrant with the return on it, showing that on the 28th of March, 1892, he was arrested on that charge, and in addition to that a bail-bond and the record in the case, showing that at the time of the death of the deceased it was pending. That the case was set for May 16th, 1892, and that it was continued until the 16th day of May, 1892, and continued to May 23d to be set; that on the 23d of May the case was continued to May, 31st, 1892; that on the 31st day of May, 1892, it was continued to June 6th, 1892, for arraignment; that on the 6th day

of June, 1892, it was called, and a plea of not guilty was entered and a trial by jury demanded; that on the 26th day of July, the cause coming on regularly for trial, it was continued to September 22d, 1892; that on the 22d day of September the case was called and dismissed on account of the death of the defendant. It is offered for the purpose of showing that at the time of the death of the defendant that he was under arrest upon a criminal charge—that of extorting by means of threats—attempting to extort money, to-wit: the sum of three hundred dollars of lawful money of the United States from said A. Marks by means of a verbal threat then and there made by said Louis B. McWhirter to accuse said A. Marks of a crime. I offer that upon two phases of the case, if your Honor please, on the same proposition which your Honor admitted the testimony of the financial stress, and I also offer it in connection with the testimony of the witness Bernhard. I propose to show this is one of the things which occurred, that he stated if he got into disgrace or anything of that kind that he would commit suicide. I offer it to show, in connection with the other facts, that at the time of his death there was a criminal charge pending against him, and secondly, to show, in connection with that testimony, that he had been charged with crime, and had been arrested in his home and had been compelled to give bail.

Admitted in evidence.

Mr. Campbell—I will make a statement of the substance of it. State of California. In the Police Court. People of the State of California vs. Louis B. McWhirter. A. Marks, being duly sworn, deposes and says that

Louis B. McWhirter did, in the City of Oakland, County of Alameda, State of California, on or about the 4th day of January, 1892, did unlawfully, wilfully and unsuccessfully attempt to extort money, to-wit, the sum of $300, from said A. Marks, by means of a verbal threat then and there made by said Louis McWhirter to accuse said A. Marks of crime. And all of the acts of said Louis B. McWhirter in the premises were and are contrary to the statute in such cases made and provided, and against the peace and dignity of the People of the State of California. He therefore prays that a warrant issue and that said Louis McWhirter be dealt with according to law.

A. MARKS.

Subscribed to before me this 11th day of March, 1892.

W. S. BROWN,
Clerk of the Police Court of the City of Oakland.

[Endorsed:] 4225. Police Court in and for the City of Oakland. People of the State of California vs. Louis McWhirter. Filed this 15th day of March, 1892. W. S. O'Brien, Clerk of the Police Court of the City of Oakland.

Upon that we offer now in evidence the warrant issues upon that complaint on the 15th day of March, 1892, in addition to that the order, the return on the warrant. There is an order authorizing it to be served out of the County of Alameda, dated the 28th day of March, 1892. The return on the warrant is: " I hereby certify that I received the within war-

rant on the 28th day of March, 1892, and served said warrant by arresting the within-named defendant, at Fresno, California, who gave a bond in the sum of $200, before D. K. Prince, Justice of the Peace of said Fresno County, for his appearance as required by law, which said bond I have brought into court this 30th day of March, 1892. William ———, Sheriff, by W. W. Morrison, Deputy.

That the bail bond was given for the sum of $200, signed by sureties on the 29th day of March, 1892, J. P. Meux and F. F. Letcher.

The record is as follows: City of Oakland, County of Alameda, State of California. Honorable B. F. Ogden, presiding. People vs. Louis McWhirter. Charge, misdemeanor. The following proceedings were had. Complaint and affidavit of A. Marks filed, alleging that one Louis B. McWhirter did in the City and County of Oakland, County of Alameda, and State of California, on or about the 4th day of January, 1892, commit the crime of misdemeanor, to wit: Attempting unlawfully and wilfully extort money from the complainant. Defendant arrested by Sheriff Morrison, and brought into Fresno County, California, and by virtue of defendant filing a good and sufficient bond, was released from custody, and the cause was set for May 16th, 1892. On the 16th day of May, 1892, the cause is called and is on motion continued to May 23d, to be set. On this 23d day of May, 1892, the cause coming on regularly, is by consent continued to May 31, 1892. On the 31st day of May the cause is regularly continued to June 6, 1892, for arraignment. On this 6th day of June, 1892, the cause is regularly

called, and defendant, by his attorney, enters a plea of not guilty and demands a trial by jury, and the cause is set for July 26, 1892. On this 26th day of July, 1892, the cause coming on regularly for trial, on motion is continued to September 22d, 1892. On this 22d day of September, 1892, the cause is regularly called, and on account of the death of defendant, the cause is struck from the calendar.

Melvin C. Chapman, a witness sworn on behalf of the defendant, testifies as follows:

I am an attorney-at-law in the city of Oakland, and have been mayor of that city. I knew Louis B. McWhirter, and became acquainted with him in the month of January or February, 1892, at Fresno. I heard the record which you just read. I was asked by Mr. Marks to assist in the prosecution of the case. I was not regularly retained in the case. Some time in the month of June, 1892, McWhirter came to my office at the City Hall, and said that the charge was still pending in the Police Court, and asked me if I would see Marks and have it dismissed. He told me that he had agreed that he should not be prosecuted. I told him I would see Marks. He said: "Chapman, you don't know how this thing has worried me. I have lost over ten pounds of flesh, my political enemies down at Fresno are throwing this criminal charge in my teeth all the time, and it is worrying myself and wife almost to death, and I wish you would go and see Marks and have the prosecution withdrawn." He said he was not afraid of the charge; that he would be acquitted on

the trial, but he said it was the idea of having the charge over him that he wanted to get rid of.

G. E. Colwell, a witness sworn on behalf of the defendant, testified as follows:

I am an attorney-at-law, and resided in Fresno from 1886 until 1890. Mr. McWhirter and I were associated in Fresno at one time in publishing the Fresno Democrat. After I came down here in 1890 I only met him once. At the time of his marriage we were associated together in business. About a month or so before his marriage he told me he was going to marry Nannie Blasingame, and he bought a ring from a jeweler named Markwood on credit, I going security for the ring. I know the ring had not been paid for three or four months ago.

CROSS-EXAMINATION.

The sum agreed to be paid for the ring, my impression is, was something over $100, and perhaps $150. It was a diamond ring. When McWhirter went out of business with me, to get rid of him I assumed the indebtedness for the ring. This was after his marriage in September, 1889, about that time.

Thomas H. Bates, a witness sworn on behalf of the defendant, testified as follows:

I have lived in Fresno since 1889, and knew McWhirter very well—was quite intimate with him. About three months or maybe more before his death took place, I had a conversation with him in his office in the Fresno Loan and Savings Bank building. I was in his office when the insurance agent handed him

a policy for which Mr. McWhirter handed him two notes. The agent went out, and I made the remark to Mr. McWhirter "Are you getting insurance?" He said, "Yes, I have just got $60,000 worth"—I am not sure whether he said he had got $60,000, or was getting that much, and I think he added, "I am going to get" or "going to try to get $40,000 more." I said, "That is a big amount of insurance, Mac, to carry." He said, "I am doing it for my family's sake." I said, "What are you apprehensive of?" He said, "You know this is going to be a very lively campaign, and there is no telling what might happen before the election is over." I said to him, "From whom do you apprehend danger?" He said, "You know my enemies." I said, "I don't share in your fears whatever." He says, "You can't tell," very emphatically, "there may be a quarrel, and I may get killed or may kill somebody else," just like that, "and I don't want to leave my family without," I believe' "without something. I don't want to leave my family without something."

I recollect Mr. McWhirter took a very active part in the election of Mr. Church as an Assemblyman from the First Ward. That was in the election of 1891. Mr. McWhirter exercised all the power and influence that he had with the citizens of the ward to secure the election of Mr. Church, and in doing so antagonized quite a number of Democratic citizens who were opposed to Mr. Church. Some time in 1892 we used to talk, in a general way, of course, about the probabilities of the United States going Democratic in the national election, and Mr. McWhirter always ex-

pressed an admiration for Mr. Cleveland, and a desire to see him nominated and elected, and he sometimes would suggest in his conversations that there would be an element in the State convention which would endeavor to send delegates to Chicago that would be opposed to Mr. Cleveland, and he mentioned some of the more prominent and active. He said he was liable to get into a fight with Mr. Terry, with Mr. Grady or Judge Harris, or any of their friends. He said of course if he got into a fight with them that he supposed it would be a fight to the death, or some words to that effect. That was about the general trend of the conversation. He was prepared for a quarrel, and looked for a fight at any time from any of these sources or their friends. He felt as though it was liable to be a fight at any time. He was ready for it, and supposed it was the same on both sides.

Mr. Thornton—I move to strike out the entire testimony as to declarations as too vague and ill-defined; not the substance of the issue, and has no tendency to support the issue.

(After argument)

The Court—I will deny the motion. I think the testimony may be relevant on other issues in the case; not upon the issue of fraud, but perhaps upon the other issues in the case. The testimony may stand.

Mr. Thornton—We except.

CROSS EXAMINATION.

I judged the election of Church to be the inception of the trouble. I did not hear of any difficulty after Church was elected. It was a very close contest in

that First Ward, and Mr. McWhirter took a very active interest in it.

I recollect the contest that was had at the Democratic primaries in the spring of 1892 over matters in the First Ward. Mr. McWhirter lived in the First Ward.

I recollect that the primary election was held some time in the summer of 1892, but as to the month exactly I could not say, but it was before that time that Mr. McWhirter made those statements to me about the possibility of getting into a fight with parties you have named, or their friends. He never said anything to me about it after the primaries. We had but very little conversation after the primaries.

I don't know the name of the insurance agent I met in Mr. McWhirter's office.

Re-Direct Examination.

I think Mr. Church went into office in the city council in April, 1891; and it was the acts of Mr. Church and several other persons of the council after their election, in relation to certain appointed officers, that created quite a trouble down there.

Mr. McWhirter believed that Mr. Grady, Mr. Goucher and Mr. Terry were opposed to him—that is, they were opposed to letting Mr. McWhirter become any way prominent in politics—in the local Democracy in Fresno. He believed that. The parties were designated as the Triangle. These words were never used in Fresno until Mr. Baker came there, and Mr. McWhirter had left for the mountains in the summer of 1892. When Mr. Baker came up from

Stockton and took charge of the editorial department of the Expositor, in the very first issue that word was used—the Triangle. Mr. Baker was living in Mr. McWhirter's house. The triangle were generally supposed to be three of the trustees—Halford, Cole and Vey.

After Church took his seat, I always understood that Mr. McWhirter had come to an understanding with three of the Board. I don't know that McWhirter had any trouble with any of the persons I have referred to.

Between April of 1891 and the primaries of 1892, I used to walk home with Mr. McWhirter. Some time in the fore part of 1892, and before the time this person was in his office with the insurance policy, and before the primary, he expressed his fears that he would not be surprised if he would be attacked in going home after dark. I have only a vague recollection of his having made that remark.

He would ask me to walk home with him in the evening, or something like that. I did not share in his fears at all. When we were walking home and the subject might be brought up he would say, just as I have remarked, he might probably meet with some enemy, or something of that kind, I don't know the exact tenor of his language, but he would express an apprehension of meeting somebody and having trouble.

(The jury was then dismissed, while the following testimony was taken before the Court:)

E. F. Bernhard.

The Court—Head this "Statement of testimony of E. F. Bernhard, a witness called for defendant, which

testimony was offered on behalf of the defendant and upon objection of the plaintiff, was excluded."

Mr. Campbell—Q. Can you now fix the date of your conversation with Mr. McWhirter, as near as possible?

A. I think it was in the spring of 1889.

Q. The spring of 1889? A. I think so.

Q. Now, will you please state what, if anything, Mr. McWhirter said to you in relation to suicide or in relation to under what circumstances he would commit suicide?

A. The exact conversation I could not state at this time, but to the best of my recollection, it was this, that if he ever did anything that would disgrace himself or his family that he would kill himself, or that he would kill himself if he ever did anything that would bring disgrace upon him or his family.

Q. Is that the substance of the testimony?

A. That is the substance.

Q. Where had you been that evening, if you remember?

A. We had been to a little entertainment at Mr. Grady's residence.

Q. You were going home together, were you?

A. We were coming together. We left together—we walked from Mr. Grady's residence to this point.

Q. That was the substance of what he told you?

A. Yes, sir.

The Court—You might state in what connection this conversation arose.

A. We were discussing, to the best of my recollection, some of the history, you might term it, of another

person, and in that connection this conversation arose out of that.

The Court—That is all; I think the ruling is correct.

Mr. Campbell—I was going to make the following offer—to re-offer this testimony in connection with the testimony that was offered this morning of Mr. Chapman and the record.

Objection sustained and defendant excepts.

Richard S. Heath, a witness sworn on behalf of the defendant, testified as follows:

My name is Richard Heath. I first became acquainted with Louis B. McWhirter in 1890, in Fresno, and I knew him very well. My relations with him were intimate and very friendly. I was residing in the County of Fresno at the time McWhirter met his death. I am the Richard S. Heath who was indicted in Fresno County for the alleged murder of Louis B. McWhirter.

Q. State to this jury whether or not you killed Louis B. McWhirter.

Mr. Thornton—We object that the evidence is utterly immaterial to the issue in this case. It is not whether the defendant killed Louis B. McWhirter, but whether Louis B. McWhirter killed himself.

The Court—Objection sustained.

Mr. Campbell—I make my offer, if your Honor please, to prove by the men mentioned by the witness Bates, Judge Harris, the Superior Judge of Fresno county, Reel B. Terry, the attorney, Mr. Grady, the attorney, and Senator Goucher—those were the men

that McWhirter said to the witness Bates he was afraid of—and I now offer to follow this proof up by putting the same question to them.

The Court—That is clearly incompetent, and the objection is sustained.

Mr. Campbell—I desire to ask one more question, your Honor. Is your trial still pending?

Mr. Thornton—This is a matter of public record, and everybody knows it.

The Court—It is immaterial whether this trial is still pending or not.

Mr. Campbell—Note an exception.

Oliver M. Chaffee, a witness called on behalf of the defendant, testified as follows:

I am the special agent of the defendant and made a careful examination and measurement of the premises, and located all the objects seen on this map accurately.

I got the two photographs which you show me—the one with the coop in it and the other showing the middle fence—from Mr. Lee Blasingame, the brother of the plaintiff.

That map is made on a scale of three feet to the inch, and is made correct, generally and particularly, from the notes furnished by me to the surveyor. At the time I was there, there was a small coop standing at that point. This was between the 18th and 25th of October, after the murder. That was a movable coop, a small affair which anybody could move. The map marked "3" is on a scale of three feet to the inch, and made upon data furnished by me. The coop marked "4" is a small, movable coop. That which is a small, movable coop on one map and "3" on the other is a

small chicken house—what might be called a permanent house. It is larger and higher. Mr. Thompson, the attorney, spoke to me about them, and pointed out to me all the various points of interest, so that I might not overlook anything. I accepted his statements at the time. He assured me at the time that I was making my measurements that the coop stood in the place it did at the time of the shooting. Mr. Thompson was there when I made most of those measurements. I cannot say he was there every moment. I think I began with the bullet that went through the back of the water closet. After having taken such measurements as would enable me to plot the position of the water closet with reference to the fence, I proceeded to take the me measurement which would indicate where these bullets passed, so that I might make a map. I measured the position of this bullet that went through the back of the water closet, the distance from the side of the water closet, and the distance above the ground. There is nothing to show the distance above the ground on this. It is simply a plan, a projection.

I am a civil engineer, having been educated as such. The elevation of that bullet, the distance above the ground, was three feet and eight inches. That is my recollection. It was less than four feet that bullet passed through the fence. I went round from the alley into this yard, and entered this woodshed at that time. I discovered the position of where some bullet had struck on the opposite side. I measured that distance from here. I then drew a string through these two holes, made it fast to the water closet, and found the position of this bullet to be six inches lower

than a direct line through the hole. That is the bullet that went through the back part of the water closet and the fence. I then proceeded to examine the bullet that was in the eaves of the water closet, and that bullet was about seven feet from the ground. The exact distance I don't recollect. There was no bullet at this place, but a mark where the bullet had struck. Then to the left a short distance from this opening there was another bullet at an elevation of perhaps 2½ feet from the ground. That went down like that in about such a direction as that (showing), striking the ground before it went very far. There were two other bullet holes that I discovered. They were about four feet above the ground, about the same elevation. I went over in the alley and discovered two marks of bullets in the opposite fence—what I judged to be bullet holes. After that I proceeded to ascertain whether possibly these bullets might have been fired from one point, or whether they perhaps might have been fired from more than one corner. Placing myself exactly on this line, and by stooping down I could look through these two bullet holes—the one in the rear of the closet, and the other in the rear of the fence. I could adjust myself exactly on it, just as if I had a straight pole like this. Previous to that I had inserted this one in the hole that was up in the roof of the closet—in the gable end of the closet. I inserted this cane in that hole. I placed myself carefully on this line directly through the back of the closet and the fence where the bullet had passed, and when I stood up and looked in the direction of this hole this pencil was exactly in line towards my eye, and then

when I turned round like this (showing), being at about this distance from the fence, I looked directly down through that hole exactly. I experimented further. If I moved an inch this way, I being still on the same line, I would find that the direction of this pencil would be over my line of view, and if I looked around this way that hole was partly closed. If I moved back an inch or two, the reverse operation took place. If I stepped to one side a little bit, I could not see through the two holes in the back of the closet and the fence. That was the effect of the thing. After that I put my pen and pencil in these holes in the alley fence, the McWhirter fence, and stepped back to see where these two lines would come together, which I found was at the point indicated on the map. After taking these out of the holes I went into the alley and looked through the holes in this direction (showing), and found that my lines of sight came together at a point a little back of that, at the point "8"—so that it appeared to me that these bullets had passed from a point near the point "8." All of these bullets passed outward from the yard, none of them inward.

Mrs. McWhirter, I think on the 18th of October, the same day, stated that they had detectives out at work, trying to find out who had murdered Mr. McWhirter; that they had facts in their possession; that they had traced out a great many reports which had been made alleging that this was a suicide, and that in every case they had traced them home to parties who were raising the suicide theory.

Mr. Thornton—I move to strike that out. That is the opinion of Mrs. McWhirter as to certain results in regard to persons.

The Court—I don't think that is testimony. I am very clearly of the opinion that this testimony is not pertinent. The objection is sustained.

Mr. Campbell—We except.

Mr. Budd—Q. Did Mrs. McWhirter at that time say anything to you about having received a letter of instructions, or received instructions from her husband as to what to do in case of his death?

Mr. Thornton—We object as immaterial, utterly immaterial. Probably she was not asked.

The Court—Objection sustained and defendant excepts.

Mrs. McWhirter knew that I was there investigating the cause of the death. I explained that fully to her. I asked her for a full statement in regard to this matter. I do not remember of her ever at any time telling me that her husband had left a letter of instructions with her.

Cross-Examination.

I was first charged with this investigation in October, 1892. I don't know whether there was a bullet imbedded in the roof of the water-closet or not. I never saw the bullet.

Lee Blasingame, a witness sworn on behalf of the defendant, testified as follows:

I never saw the two photographs which you show me until I came here. I ordered the photographer to take some photographs of some parts of the grounds. I

don't know whether these are the photographs or anything about that.

Mr. Budd—We offer in evidence the transcript of the judgment in the case of the Fresno Company, against Louis B. McWhirter, and in connection therewith a satisfaction of a portion of the judgment by a note and a release, by a note which Mr. McWhirter got his wife to give for him.

Admitted in evidence, and considered read to the jury.

Defendant rests.

The plaintiff to maintain the issues on her part introduced the following evidence:

Lee Blasingame, a witness sworn on behalf of the plaintiff, testified as follows:

I am a brother of the plaintiff in this case. In reference to the deed marked "Exhibit 11," would say this is a piece of property that I bought from R. W. Tully of Stockton, for which I paid the sum of $15.00 per acre. I subsequently sold the property to my sister for an advanced price, and subsequent to that I sold the property for her for the sum of $4,000. I never received any money from my sister in consideration of the transfer, but when the transfer was made by her, I received the consideration. My sister, I think, received $175 of that consideration.

CROSS-EXAMINATION.

I bought this property from Tully in 1888 or 1889, or possibly in 1890. I got a deed for it. I paid $15.00 an acre, and sold it for my sister for from $20 to $25 per acre. I sold it for her to the other party

within a year after selling it to her. She told me I had better sell it. She owed me the difference. She did not pay me anything at the time, nor give me a note for it. I either paid Mr. Tully or gave him a mortgage. I sold this to my sister prior to her marriage, and sold it for her about eight months or a year after her marriage. I got a deed from her which I gave to the party who bought it. I charged her a certain interest and expenses I had paid. I made all the calculation myself. She never knew anything about it.

I don't recollect whether I ever paid Mr. Tully a dollar on this property.

I either paid him at the time I bought it or subsequently.

Before the coroner's jury went to the vacant lot next to Mrs. Southworth's I went there one evening at sundown or just about sundown. The first time that I saw that the tree was moved from its old position in the grass where it had lain a good many years and the imprints of the tree was made in the grass, and where it had imbedded itself on the ground, I took the tree back and placed it in its exact position as near as we could to ascertain how much of a club had been removed from the tree. I found the tree three, four or five yards from the fence. I cannot say that this was after dark. It seems to me it was about sunset or a little before sunset.

This was before the coroner's jury were taken to the premises. I think I was present most of the time that Mr. Bury was being examined at the coroner's jury. I do not remember hearing Mr. Thornton ask

Mr. Bury what he would say if no sawdust was to be found at the place where this tree was sawed. I do not remember the examination of Mr. Bury as to the sawing of that piece of wood in that lot. I may have been present at the time and I may not—I cannot say about that. At the time the log was put back I think Mr. Thompson, Mr. Thornton, my brother and Mr. Zeigenfuss were with me. I do not remember anything being said about the log having been brought back from where it was sawed to its original position.

Q. Is it not a fact that within six hours after McWhirter's death you were looking for evidence of his having used his saw for the purpose of sawing these clubs?

Objected to as immaterial. Objection sustained and exception.

RE-DIRECT EXAMINATION.

I think that bough had been moved from the place where the imprint was on the grass from 7 to 8 or 10 yards. At the time that I moved it back I had been told that the witness Bury cut this bough.

RE-CROSS EXAMINATION.

The only object in moving it back was to find out how big a piece Mr. Bury had cut out.

Mrs. N. S. McWhirter, a witness called on behalf of the plaintiff, testified as follows:

I am the plaintiff in this action. I remember selling the property described in Exhibit No. 3 to Mr. Rorden, and to the best of my recollection that is a copy of the mortgage. The original amount of that is

$150. I remember one fifty, and there may have been two 50's paid after my marriage.

I remember a mortgage given me by J. A. Lane for the purchase of some property, some time in 1888. The mortgage was released some time after I was married. I don't remember what the moneys received on either of these mortgages was used for. I don't remember that mortgage given by a man named Foeber for $400. I know it must have been done, but at the same time I don't remember it.

Exhibit No. 6 is a transfer from me to my mother of some lots, and I made $20 on the transaction. I used that money in a general way.

Exhibit No. 7 is a mortgage from me to the Farmers' Bank. I borrowed that money from the Farmers' Bank, and used it in various ways. I cannot state now.

I recollect executing a mortgage to the Fresno Loan and Savings Bank for $1,500, on the 15th day of May, 1889, and used the money to make some improvements on property in which I resided and have resided in ever since. At that time I spent more than $1,500 for the house, and afterwards for office furniture—law books and office furniture.

I recollect executing a mortgage about the 31st day of May, 1892, to the Fresno Loan and Savings Bank for $1,000, but do not recollect what that money was used for.

I recollect executing a mortgage to the same bank for $400, on July 31st, 1891, which I used to go to San Francisco with my baby, who was very ill at the time, and used it for that purpose.

I recollect executing a deed of certain property in Fresno for $700, and an additional $100 for the choice of four lots which we owned jointly. I received that before my marriage, and used the greater part of that in buying clothes.

I recollect making a deed about the 28th of September, 1888, to J. A. Lane, but do not recollect what the consideration of the deed was.

At the time of my husband's death I had some lots with brother, Oliver Blasingame. They were undivided at the time we purchased them, and he simply took the deeds.

As near as I can remember, the street grading on the lots I owned in the city of Fresno in 1889 and 1890, was between $275.00 and $325.00. I also had taxes to pay at the time on all the property that I owned.

Before I was married I was acquainted with Mr. McWhirter's financial condition. He had sold his interest in the Democrat the September before we were married, and I understood that he had from that $1500 or $2000—that he had sold his interest for that.

On the 28th of August, 1892, Mr. McWhirter was in perfect health. He was of an unusually cheerful disposition. I rarely knew, or never knew him, in fact, when you could say that he was despondent or lacking in hopefulness.

With reference to his actions and disposition on Sunday, the 28th of August, 1892, after his death it seemed to me for a time that he was unusually affectionate, and yet, in thinking it over, I cannot see that his conduct was any different from any other time in

his life, because he was always of a very affectionate disposition, and always very attentive to both myself and our little boy.

I don't remember stating to any person that Mr. McWhirter had said on Sunday, the day before his death, anything about how the house was to be fixed, or fixing the house in case of his death.

Mr. Thompson—I wanted to ask her whether anything was said between herself and her husband.

Mr. Budd—I object as immaterial and incompetent.

The Court—I think you may ask her whether or not he made that statement.

Mr. Budd—Exception.

The Witness—I do not now recollect any such statement.

Mr. Thompson—Q. How often, Mrs. McWhirter, did you and Mr. McWhirter discuss and talk over the subject of training and education of your child?

Mr. Budd—The same objection, that these declarations we cannot contradict, and we can only contradict the statements made by the lady who is on the stand.

Objection overruled and exception.

Q. About how often?

Same objection, ruling and exception.

A. I suppose a dozen times a month from the time he was about fifteen months old. The child was born on the 29th of December, 1889.

I know Mrs. J. A. Lane. I used to see her every evening for three or four months. She came to my house every evening to deliver milk.

I know Mrs. L. R. Williams, but am not socially intimate with her. From the time she moved away

from next door to the time of Mr. McWhirter's death, I think she visited me once when I was ill for some time.

I have seen very little of Mrs. Linforth, and never was intimate with her. We probably exchanged calls once in two years.

At the time we were married I think my property was worth from $12,000 to $14,000, and at the time of my husband's death there was an indebtedness on the property of from $3200 to $3500.

John S. Eastwood, a witness sworn on behalf of the defendant, testified as follows:

I live at the residence of A. M. Clark. The sound of repeated firing awoke me on the morning of the 29th of August, 1892. I made a mental calculation of the shots, and I heard six or seven shots—I am not positive. There was a group of shots, then a pause, then another group of shots followed. I cannot tell how many shots there were in the first group, but there were three in the last group. I also heard the sound of screaming, but could not tell whether or not I heard any of it after the shooting began and before it ended. I cannot remember of hearing anything else except the screaming.

It seems to me that I heard a groaning sound.

Mr. Campbell—I move to strike out what it seemed.

The Court—I think it may stand as it is.

Mr. Campbell—Please allow us an exception.

I cannot distinctly call the sounds of the groans.

CROSS-EXAMINATION.

I was certain there were six shots, but not any more.

W. R. McFarland, a witness produced on behalf of the plaintiff, testified as follows:

I am employed as a detective by Harry N. Morse, and was in Fresno a short time after the death of L. B. McWhirter, having been employed by his widow. I arrived in Fresno on the 2d of September, after the burial of the deceased, and visited the premises a short time thereafter. A few days after I arrived there either you (Mr. Thornton) or some of the family sent for me to examine the middle fence between the chicken yard and the main yard. There was a certain barley sack there that was one of several others that had been tacked along the fence. It was a whole sack, that is there were two thicknesses of the sack tacked on the fence. The hole was through both. The hole from the main yard was a small hole, not very ragged —a pretty clean cut hole. The hole on the other side of the sack was larger and somewhat ragged. The edges of the thread were fresh and showed a fresh appearance as distinguished from the weather-beaten appearance of the balance of the sack, so much so that my judgment was that the hole had been made through those sacks at a comparatively recent date—I should think in the summer time. I don't believe I subsequently examined the edges with a magnifying glass. The sack seemed to have been bulged out towards the chicken yard, as though whatever made the hole had come from the yard toward the chicken yard.

The hole in the sack on the south side of the yard was the smaller. I suppose I could have stuck my finger in it easily, or stuck a pencil through it. I think the hole was perhaps not so large as a dime.

In the course of my life I have seen a good many bullet holes through fabrics of cotton, wool, linen, silk or flax. I have seen men killed, and shot through their clothing.

CROSS-EXAMINATION.

I cannot recollect that I have seen any bullet holes through sacks before this.

RE-DIRECT EXAMINATION.

The hole on the south side of the sack was apparently a round hole, portions of the fiber being cut away. The edges of the shred or fiber were fresher and brighter and newer in color than the surface of the balance of the sack. The balance of the sack had the appearance of being a weather-beaten sack. The edges of the hole were nearer the color of a new sack —one that had not been in the weather.

The hole on the northern side of the sack was more irregular in appearance, and was longer one way than the other, its greatest length being up and down, the bottom of that hole being a little lower than the bottom of the hole on the south side of the sack.

After I had examined the hole on the south side of the sack, I stuck my pencil through the holes in the cloth, and the course of the pistol, instead of being at right angles with the face of the fence, was at an angle say, perhaps of 45 degrees, and whatever made the hole must have just missed the outer edge of one of the slats and the inner edge of the other, and the direction was downward.

I sighted the direction a ball would take in making these holes, and found it would have struck the ground

a few feet of the fence. That is, say, six feet from the hole in the sack.

I was sent for again in a day or so afterward, and saw a bullet in a board that was nailed to a fence on the south side of the division fence between the McWhirter's yard and Mrs. Southwood's yard. I think it was rather close to this corner and along that line of fence right there. The board was nailed on the fence below the base-board or stringer. It was tacked on below and one edge of it was on the ground. I don't remember whether it was redwood or pine. I got down on my knees and looked at the bullet hole in the board. The board was not removed from the fence in my presence, and I never saw it again. The bullet was not entirely imbedded in the board, but had struck the board at an angle of about 45 degrees, and had gouged a furrow out of the board before it stopped. The wound in the wood had been made so recently that it was new, and had not been made a great while.

The bullet was a new bullet, and had not been in that board a great while. I took a sight of those holes and found that that shot might have been fired from a point just within a few feet of the gate inside the yard, or it might have been fired from the outside of the yard in the alley by a person standing and shooting over the fence. Either position might have sent a ball in the direction that that had taken.

CROSS-EXAMINATION.

The hole in the sack is between two and three feet above the ground, and the bullet struck the ground about five feet from the sack. I did not make a search

for the ball. I never saw the bullet or anything of that kind, and never went over to the north side of the yard to see whether there was a bullet there or not. I found this little 32 bullet in the board four or five days after I found the hole in the sack.

At the time I saw this hole in the sack I saw a chicken coop in the corner of the yard. I am unable to say whether that corner at the time I saw the hole in the sack was entirely filled with coops. There were some boxes, I think, in that yard—perhaps in the corner.

Q. When you saw the bullet in the board, how far was the bullet in that board from the corner of the fence—I mean out toward what is marked stable here. Give your best judgment?

A. You mean from the stable in there, from this corner.

Q. Yes? A. I cannot tell you that.

Q. A foot? A. More than that.

Q. Two feet?

A. I think more than two feet. I cannot give you my best impression as to the distance. I do not remember what obstructions were in the corner at the time I saw it.

In reference to where the shot was fired from that went through the sack, I am testifying to what I believe. I have no recollection as to the length of that board, nor no knoweledge as to its thickness.

My recollection about that corner is that there were some coops or boxes, one and both in that corner, that were there before my attention was called to that ball. I think they were there at the time I saw that hole through the sack.

I have been requested to appear here as a witness, and have interviewed one or two persons on this case.

I do not know the caliber of the bullet found in that board.

I don't recollect whether there were any more holes than those two in that sack or not.

I cannot tell you whether that bullet was lodged in a plain or rough board, or whether the board was a piece of an old box or a piece of the fence. I paid very little attention to the board.

Mrs. Emma Southwood, a witness sworn on behalf of the plaintiff, testified as follows:

I reside in the house adjoining Mrs. McWhirter's on the north, as laid down on the map, and was sleeping there the night of Mr. McWhirter's death. Some noise awoke me, I don't know what it was, and the first noise I heard after awakening was the report of a pistol. I don't know how many reports I heard. After the second shot I heard there was a terrible groan. Beside the pistol shots and the groan, I heard a shuffling of feet at the back kitchen door of Mrs. McWhirter's—like the shuffling of feet of two or three persons. This was after the pistol shots. They sounded as though coming my way first. I heard Mrs. McWhirter scream after the pistol shots.

I saw Mrs. McWhirter go by the refrigerator to go into the back yard. There was a gas light in her dining-room. They always had a light burning there. She was going out through the back porch. I heard the shuffling of footsteps for a moment, and they faded away in the distance. Myself and daughter dressed almost directly and went to Mrs. McWhirter's.

CROSS-EXAMINATION.

I was very much frightened. I thought there were burglars coming there. I did not hear Tom Rhodes go over there, or tumble over the woodpile.

The groan I heard was Mr. McWhirter's voice. I heard the footsteps before Mrs. McWhirter screamed. I did not see Mrs. McWhirter until after the shooting was over.

I am certain she did not scream until after the shooting was over.

Miss Carrie Southwood, a witness called on behalf of the plaintiff, testified as follows:

I am the daughter of Mrs. Emma Southwood, and live in the next house on the north side of Mrs. McWhirter's. I am not sure what awakened me on the morning of the death of Mr. McWhirter. My mother was near me when I awoke; she was standing at the foot of the bed, Then I looked out of the window and saw Mrs. McWhirter pass by the refrigerator. She came out of her bedroom and I saw her in her dining-room. I heard no pistol shots on that night at all, nor groans. I heard Mrs. McWhirter scream when she was in the dining-room.

Archibald McDonald, a witness on behalf of the plaintiff, testified as follows:

I live in Madera, Madera county, and am County Recorder. I have lived in California since 1849, and crossed the plains to come here. I have a general familiarity with gunshot weapons, rifles, shotguns and pistols. I have been engaged in Indian warfare, and have lived the life of a frontiersman, depending upon my rifle for support and protection.

I was in Fresno a day or two before the inquest on the body of the late L. B. McWhirter, having gone there at your request. I remained there one night and a day, or two nights—I don't recollect. I knew Mr. McWhirter quite well. I visited the premises in your company and some others.

I saw a barley sack tacked on the north side of the middle fence, about 13½ or 14 feet from the rear fence. I saw a hole through that sack. There were two thicknesses of the sack. The size of the hole on the south side, or the side nearest the fence, was about the size of a 5-cent piece, or a dime probably, and the hole on the north side of the sack was larger—probably it would take a nickel to cover it. The sacks were mildewed; they had been there the winter before, I should judge, and on the south side the hole was not very observable. It did not show any fresh threads that were broken, but on the north side, on the inside of the chicken corral, the threads, where they were broken off and carried away, were fresh.

I subsequently saw a plank or board in the northwest corner of the chicken yard, about six inches wide and seven or eight feet long in length, at least, which had a bullet in it. The bullet evidently entered the board at an oblique angle, and had plowed along the grain of the wood some three-fourths of an inch to an inch before it had imbedded itself. It was not entirely imbedded. The butt of the bullet was still visible.

The board was an old, stained board, and this fracture had been evidently made since any rain had been

on the board. I thought the bullet had not oxydized any, the inside of the bullet showing bright lead where it had mashed—abrased. The abraded part of the bullet was bright. The part exposed to the surface had about the general color of bullets that have been moulded some time for cartridges, etc.

I knew very well what I was looking for, and I sighted to see where the shot could have been fired from. I saw at once that the shot could not have made two holes unless the bullet had struck the ground and ricochetted, and the direction would take it out about where the gate in the main yard is. My impression at the time was—of course, it was only conjecture—I thought the fellow had fired it from the outside of the gate from the alley there, but he could probably have fired it from the inside. I think both things are possible.

I never saw anything abnormal in McWhirter's disposition. I thought he was very cheerful as far as my intercourse with him went.

CROSS-EXAMINATION.

The bullet was pretty close up to the corner of the chicken yard, within two or three feet of the corner.

The edges of the hole on the south side of the sack were round, as if a bullet had gone in there, and the threads were pushed inward.

W. W. Raims, a witness produced on behalf of the plaintiff, testified as follows:

I live in the Central Addition to Fresno, about a block and a-half from the McWhirter residence. At about three o'clock the morning that McWhirter was

killed, I got up and went out to the water closet. I returned to the house and had just turned the cover back to get into bed when I heard two shots, as close as could be, then there was a little pause, then there was one shot, and then four shots—seven shots altogether. I think I counted them mentally as they came.

I have used firearms ever since I was a boy. It is my opinion that the first two shots could not have been fired out of the same pistol.

Mr. Budd—I object that the witness could not tell. No other man could tell. He can describe them. It is for the jury to tell. I move to strike it out.

The Court—I think the answer may stand.

Mr. Budd—We except. Our motion is on the ground that it is incompetent, and the witness could not tell.

The Witness—Immediately after the shooting I run to the front door. My doors and windows were all open. Just about the time I got to the front door I heard a light wagon start from near the place of the shooting or beyond it, a little from my place, and drive to the north end of town. When I ran to the door I also heard a woman scream. That is all. I did not hear any of the screams until after the shooting was all over.

Cross-Examination.

One man could have fired the last four shots. I don't think a man could have fired one pistol twice as quick as these first two shots were fired. A man holding two pistols in his hands could have fired them. I did not notice any difference in the sound of the shots. It was all very keen and sharp, and none of it muffled.

Mrs. M. E. Raims, a witness sworn on behalf of the plaintiff, testified as follows:

I am the wife of the last witness, and was living with my husband in Block 6 of the Central Addition on the night of the death of Mr. McWhirter. I was not awake at the time the shooting began. I supposed that the first two shots and my husband returning to bed woke me. I counted five shots on that occasion. There were pauses between each shot in a way that you could count them, as I remember. I could not say whether or not there was any pause between the first shot and the last four shots, because I was so excited at the time it was something hard to tell. I don't remember as to that. I heard a buggy directly after the shooting. I heard Mrs. McWhirter when she gave the first scream, which was directly after the last shot was fired, as near as I can remember. My house is about twenty feet back from the edge of the sidewalk. I don't think I heard any groans.

CROSS-EXAMINATION.

All I know about the shooting is that I heard five shots, and they seemed to be the same length.

Stewart S. Wright, a witness called on behalf of the defense, testified as follows:

I am an attorney-at-law, and the night of Mr. McWhirter's death was sleeping about from 250 to 300 yards from his residence. I was awake a few minutes before the shooting began, and it appeared to me like there were eight shots fired. I counted the shots in my mind as they were being fired. The shots were not

fired regularly. The space between the shots did not seem to be the same. It is so long ago that I cannot testify with any degree of positiveness as to the intervals. I heard voices between the third and fourth shots. They seemed to be hallooing more than screams. The expression seemed to be one of surprise. It was quite a loud cry, and of a male voice. Toward the close of the shooting, or possibly, immediately afterward, I heard expressions of pain, or what seemed to me to be expressions of pain. Afterwards, or possibly near the close of the shooting, I heard what appeared to me to be a female voice in distress, and that caused me to go over. The female voice was after the male voice. After I heard the shooting on that morning I got up and dressed as soon as I heard the cries of distress, awakened Mr. Miller, and we went over in the direction of the shooting.

CROSS-EXAMINATION.

It is possible for one man to have fired all the shots, yes, sir. It seems to me there was an interval after the first six shots, but that may have been in my mind, I cannot tell. I was waiting for the sixth shot, and when that happened, I said to myself there would be no more shooting. I could not swear as to the interval. I would not be willing to say now that there was any pause at all. I know there was one shot after the sixth, but I think I heard another one. I did not notice much of an interval during those six shots. I cannot tell whether there were ten shots or not. My best recollection is that there were two shots after the sixth. It seems to me that there was an interval after the sixth.

I slept on the north side of the house, toward McWhirter's residence.

James B. Hume, a witness produced on behalf of the plaintiff, testified as follows:

I am a special officer of Wells, Fargo & Co., and was in Fresno the night Mr. McWhirter met with his death, sleeping in the northeast corner room of the Grand Central Hotel on the second floor. My windows were open on account of the heat. Young Cross, the son of Superior Judge Cross of Visalia, and Frank Bird, were with me. They were in my room, and I was awake in bed. I heard shots coming apparently from the north. I am uncertain how many I heard. At the close of the shooting I counted seven.

What counting I did I did aloud. I don't say that I counted seven shots, but at some stage of the proceeding I began counting and when the shooting ceased 7 was the number I mentioned.

When the shooting ended I requested one or the other of the young men to look at my watch on the stand. My recollection is it was 15 minutes past three. I heard no other shooting that night. There was an interval before the last shot and there was an interval before the two preceding shots. The shots prior to that first interval went right along rapidly, then there was an interval, then two shots, then an interval, and one shot, which closed the shooting. I do not mean to say there was an interval between the 6th and 7th shot, I mean to say there was an interval before the last shot, and there was an interval between the two shots preceding that.

I heard the woman's voice cry murder at least once, and I don't know but twice.

CROSS-EXAMINATION.

I am not certain whether there were six or seven shots. I cannot say for a certainty that I did not commence counting when the shooting commenced, but presumably I did not.

I commenced during the shooting, and instead of saying one I might have commenced at three or four. I don't think there were seven shots. I think there were only six. I know that after the first interval there were not four shots, and I know that after the second interval there was one shot. I am absolutely positive that after any interval the largest number of shots were three.

RE-DIRECT EXAMINATION.

I testified on the Heath trial.

I know John N. Thacker very well. He occupies the same office with me when here. His views are that L. B. McWhirter committed suicide. We talked the matter over a number of times. I testified on the Heath trial that I counted seven, and I testify now that I counted seven. I have given my reason why I think there were but six. I did not intend to convey the idea that I commenced with one. I closed my count with seven. My impression is that I commenced at four, at the first lull. That is my present impression. When the lull came I commenced counting the shooting, and I think I said four when I should have said three.

Re-Cross Examination.

Mr. Budd—Q. Do you know on what Mr. Thacker's opinion as to the suicide of McWhirter is based?

Mr. Thornton—We object to that as utterly immaterial.

Objection sustained and defendant excepts.

J. E. Baker, a witness sworn on behalf of the plaintiff, testified as follows:

I am a newspaper man, and at present reside in this city. In the months of June, July, August and September, I was residing in Fresno, Fresno County, Cal.; part of the time I was lodging, part of the time I occupied the house of Mr. Jackson, the major portion of the time I occupied the house of Mr. L. B. McWhirter. The night Mr. McWhirter died I was sleeping at the house of Mr. Jackson, about three and a-half blocks away. On that morning I was awakened by Mr. Jackson, and immediately dressed myself and went down to the McWhirter house, arriving there as near as I can remember from 10 to 20 minutes after 4. It was dawning. I entered by the front entrance, walked around the house and immediately to the rear, and asked some one where it had occurred, and walked to the spot where the killing took place. He had fallen at the point marked letter "B" on that map, approximately. I made but a very brief and cursory examination. Some one told me they had found two clubs, a mask and two pistols. I think a man known as dead-shot Ward pointed me out where it occurred. I think Mr. Babcock then came to me. The only examination I made then of the ground was

right between the lattice and the fence, and directly in front of the water closet. It was very sandy and quite soft. It was not wet, only damp, and there were marks of a footprint there shoved along, which had ridged up the sand, leaving the impression of the marks of the feet as if dragged along in three or four places, all within a circle of five or six feet. I called the attention of Ward to it, and some one then came out of the house and told me Mrs. McWhirter wanted to see me. McWhirter was dead when I arrived there, and the body had been taken into the house. I saw the body, with the chest exposed to view, and the wound. The wound was a round hole right close to the nipple, as though it had gone in at an angle from above and to the left.

I was a soldier for three years and was in quite a number of great battles. I have seen a good many men die who were killed by gunshot wounds in my immediate presence, some in personal conflict. The hole was almost a perfectly round hole. It had filled the size of the bullet that had gone through as though there was no obstacle in the way of its going in, and apparently carried nothing with it. There was slight powder stains, as I could see. They looked like very slight powder stains around the wound, but I did not see any scorch. I made a second examination the same day. At first I thought that the night-shirt and the undershirt were blackened with powder, but when I came to make the second examination I concluded that it was not, that the blood coming from the wound had caused the blackening process on the shirt, the inside of it.

The garments which you show me are apparently the garments worn by McWhirter on that night.

I saw the five bullet holes—three in the rear fence and two in the water closet.

On Monday, a week after his death, my attention was called to a gunny sack nailed or tacked upon the north side of the middle fence. You called my attention to it to the best of my recollection. I think Mr. Lee Blasingame, Mr. W. P. Thompson, Albert Blasingame and Mr. McFarland were present.

The sack was nailed down close to the ground, double width. It apparently had been there a long time, it was weather-stained and somewhat mildewed, and there was a hole through the sack at an angle of from 35 to 40 degrees. The smaller hole was on the south side of the sack, and was about the size of an ordinary bullet, or a little larger than this pencil—about the size of a ten-cent piece, I should judge. It was a clean cut hole, and round, and the edges were new, and bright, and where it was taken off, sharp, almost like they had been cut. The sack sagged a little bit on the north side, and the hole on that side was torn downward. I took a sight through that hole, and whatever passed through there struck the ground about five or six feet on the north side of the fence. There was a permanent chicken coop, a wooden chicken coop, and a wire chicken coop in the chicken yard. My impression is that the chicken coop ought to be at BC (marks on diagram.)

I subsequently saw a board with a bullet in it. The board was part of the chicken coop I think. My remembrance is, it was nailed on in front of it. If

that board was on the fence it was under the stringer. Since I come to think about it, it must have been a portion of the fence. It was down in a low place where I had got on my hands and knees to examine it. This board, according to my remembrance, was 2 or 3 feet long, of pine wood, and less than 15 inches wide, and $\frac{3}{4}$ of an inch long. The bullet took a direction toward the upper left hand corner of the plank. The surface of the plank was old, and the scar was fresh, as though it had been made there very recently. The portion of the bullet which had not been imbedded in the plank looked bright.

I had known Mr. McWhirter for about five years prior to his death. He was very cheerful and buoyant, and a man of sanguine temperament. I never saw a more devoted husband.

Mr. Thornton—Q. What was his general conduct and exhibition of sentiment toward his child?

Mr. Budd—We object. These are self-serving statements.

Objection overruled and exception.

A. He was very much wrapped up in the boy; was always talking to him and teaching him things when I was there.

On Sunday, the 28th of August, 1892, I went to the house of McWhirter right after noon and stayed there until about half-past five o'clock, or may be a little later, and possibly a few minutes earlier. I went to the water closet at about 5 o'clock that evening, and had to pass right by the back fence, and I am quite positive there was no hole there at the time.

CROSS-EXAMINATION.

I made my second examination about eight o'clock on Monday morning. I did not find any powder in the flesh. When I examined the wound or looked at it first I thought the smoke the stain of powder. I could not see the powder. At the time I made my first examination I thought I had seen some powder on the flesh. It is difficult to tell whether the appearance of the wound was the same on the second examination. There was a discoloration on the outside of the white shirt. It was not very pronounced, but the discoloration was there. I thought it was powder discoloration. I took it to be such judging from the circumstance attending it. I thought it was a powder stain upon his clothes, and think so yet.

Dr. E. G. Deardorff, a witnesss sworn on behalf of the defendant, testified as follows:

I have been practicing medicine and surgery since 1879, and now reside in Fresno. I knew L. B. McWhirter in his lifetime and was acquainted with his physical peculiarities and characteristics. I think he was about five feet ten or ten and one-half in height. He was a strong and very well developed man. On the night he died I was residing on the corner of N and Kern streets, in Block 125.

I was awake at the hour of three o'clock on the morning of the 29th of August, 1892. I had a professional call to go to, and was awakened a few minutes past three. I dismissed the case, and lay down a few minutes when I heard the shots. I heard seven. I counted the shots to myself, as the explosions occurred.

I heard one shot, a very slight interval, two shots, a slight interval, and then four shots very close together. The last shot was not so loud as the others. I went to the house the day of the funeral. I did not hear any sounds, or screams, or exclamations or cries from any person at the time I heard the shots.

I saw those garments before the coroner's jury and I examined them this morning in company with Dr. Webb and Professor Price. We made a microscopic examination of the blood stains upon the garments. The power of the microscope we used was 55 diameters. The microscope did not reveal any sign or evidence whatever of powder-burning, particles of powder, ignition or charring of any of those garments.

I examined Mr. McWhirter for the Northwestern and Providence Mutual Life Insurance Companies. I do not know that he expected at the time that he would not live for six months.

Q. Did he not so inform you?

Mr. Thornton—Object, on the ground that it is not proper cross-examination.

Objection sustained and exception.

The Witness—I testified at the coroner's inquest.

Mr. Budd—Did you not testify upon that coroner's inquest that you examined Mr. McWhirter upon March 18th for the New York Life Insurance Company, and on March 23d for the Providence Life Insurance Company, and that he stated to you at that time, " I have a good many political enemies, and I expect really that my life will be attempted, or that I will be killed before the campaign closes?"

Mr. Thornton—I object to that as immaterial.

The Court—Objection sustained and exception.

The Witness—My bedroom is on the side opposite McWhirter's house. I heard seven shots, and the last one was hardly as loud as the balance. There was first one shot, then an interval, then two shots, an interval, then four shots. I live 3,750 feet from the McWhirter residence.

J. E. Baker (continued)—I was at the McWhirter house shortly after McWhirter's death.

The bullet in the board that was nailed to the fence was found back of a wire chicken coop.

On the day before his death Mr. McWhirter seemed to be in very good spirits.

Mr. McWhirter talked about being assassinated because there were certain things existing there. Not that he so much expected a thing as he apprehended that it might happen at any time.

Mr. Budd—Q. Did he not tell you that he was apprehensive of being assassinated, and for that reason he carried $60,000 life insurance?

Mr. Thornton—I object to that as not cross examination.

Objection sustained and exception.

W. W. Phillips, a witness sworn on behalf of the plaintiff, testified as follows:

I desire to make an explanation of the testimony which I have already given. I was questioned about some drafts that were drawn by Mr. McWhirter through our bank. At the time I had a very indistinct recollection about the amounts and the dates, and upon request I investigated as to the exact amounts, and

also the dates. The first draft was drawn for $1000 on March 17, 1888, upon his mother, and was paid. The $250 transaction was on the 21st of January, 1889. I took his draft on his mother, and credited his account, and he drew against that amount as he required it. The draft was paid on presentation. That was a different transaction from the personal loan I made him. I have no recollection of Mr. McWhirter's drawing any drafts on his mother after his marriage. At the time he drew these drafts I took him to be a man of 32 or 33 years of age.

Thomas Price, a witness sworn on behalf of the plaintiff, testified as follows:

I am an analytical chemist, and have studied microscopy. I have been chemist for the California Powder Works for 20 years. I examined those garments which you showed me yesterday under a power of 55 diameters with the microscope, and found in several places here what appears to be clotted blood, and portions of dried blood which had permeated into the pores of the cloth. Dr. Webb and Dr. Deardorff took part in this examination. I found no ignition of any kind or any burning. I saw no indication of gunpowder upon those garments. There was no evidence of burning, charring, ignition or combustion upon the edges of either of those garments.

Dr. E. C. Webb, a witness sworn on behalf of the plaintiff, testified as follows:

I have been a practicing physician since 1862, and from 1862 to 1866 I devoted myself to the treatment of gunshot wounds in the army. I have treated many

cases in which the wound inflicted by the assailant upon the person wounded had been made at apparently close quarters, and recollect three cases where I have seen men attempt suicide by gunshot wounds in the chest. In two of the cases the pistol was held directly against the chest, and in the other case the fellow took the pistol in both hands and fired. In all three of the cases there was combustion or ignition of the clothing worn by the attempted suicide. In one case it set the clothing on fire, because it was made of cotton goods, and in the other two cases it simply burned.

Mr. Thornton—Q. In the first instance in which the clothing was set on fire, what was the nature of the garment, and under what circumstances—

Mr. Campbell—I don't believe that is competent testimony for the gentleman, to show his experience with other cases.

The Court—I don't think that is conclusive, but it may go to the jury for its value.

Mr. Campbell—We take an exception.

The Witness—A. It was a blue flannel blouse, such as privates ordinarily wear.

Q. What was the nature of the weapon in the cases you have observed?

Same objection, ruling and exception.

A. One of the ordinary Colt's, which cavalrymen used to carry during the war.

I was present when a microscopical examination of those garments was made yesterday by Professor Price, Dr. Deardorff and myself, under 55 diameters. We

found no signs of charring or burning of the garments. I saw no discoloration other than by human blood on those garments.

W. J. Tinnin, a witness sworn on behalf of the plaintiff, testified as follows:

I am an attorney-at-law, and on the evening before the death of Mr. McWhirter, my wife and I were at his house. We went there about half-past seven and left five or ten minutes after nine. I had known him for about five years. He was a cheerful, social man, who seemed to look at the world in a pleasant light and was happy in his general demeanor and conduct. I was awake on the morning of the 29th of August and heard the shooting. I counted the number of shots out loud, and there were seven. I could not state the intervals. My recollection is some were very close together, and others were more apart.

Q. Was there anything unusual or different from the ordinary or usual talk of Louis B. McWhirter on the 28th of August?

Mr. Campbell—We object to that on the ground that it is simply the conclusion of the witness and the opinion of the witness from the acts of the party.

(Objection overruled and exception.)

A. I could not see that there was any difference. I should say his family was a very happy family. His conduct was affectionate towards his family at all times.

CROSS-EXAMINATION.

I live about six blocks from Mr. McWhirter's residence. I did not hear any other noise except the shots. My bedroom is on the opposite of my house from the McWhirter residence.

Q. Did Mr. McWhirter tell you on the 28th of August that he expected to be beaten with a club?

A. Not at that time.

Q. He had told you before that time, had he not?

Mr. Thornton—We object to that as not cross-examination.

(Objection sustained and exception.)

Re-Direct Examination.

The windows were all open.

Mrs. W. J. Tinnin, a witness sworn on behalf of the plaintiff, testified as follows:

I am the wife of the preceding witness. I was awake at the time of the shooting and heard seven shots. The windows were open, and it was a very pleasant, quiet night.

Cross-Examination.

I commenced to count the shots aloud at the third shot. I heard no screams at all that night. There was an interval between the shots, but I am not prepared to say where the interval occurred. The last four shots were close together and extremely rapid. The interval occurred before the last four shots.

A. E. Wagstaff, a witness sworn for plaintiff, testified as follows:

I reside in Fresno and am a writer and newspaper man, and in the months of August and September, 1892, I was on the "Republican." I live about 1950 feet from the McWhirter residence. I was awake on the morning of the death of Mr. McWhirter at about three o'clock. I heard three shots, and then an interval,

then three more, a pause for half a second, and then two more. The last two shots were more indistinct than the first shots. I did not hear any noises, such as screams, shouts or groans.

Philip Scott, a witness sworn on behalf of the plaintiff, testified as follows:

I am a resident of Fresno and was residing there during the months of August and September, 1892. I was a member of the coroner's inquest, and with the remainder of the jury went on the last day of the inquest to the McWhirter premises to examine a certain gunnysack which was located there (indicating on map). I think there was only one thickness of the sack. We went up to examine for a seventh bullet, that hole having been found in the sack. It was about the size of a dime. I examined the edges of the hole, and it had the appearance of being a fresh hole; the edges were slightly ragged. I subsequently saw a bullet in a plank in position in this corner of the chicken-yard, (indicating) about four feet from the corner, I think. We examined it closely with the naked eye. I don't think we used a glass. I think the bullet in the plank was four or five inches above the ground. The bullet had the appearance of striking the plank sideways, and it had torn up the surface of the plank a little, and the tear had a new appearance, as though it might have been made recently. The bullet had the appearance of being a fresh bullet.

I subsequently went over into a vacant lot north of the Southwood residence, and saw a branch or bough of osage orange which had been sawed. I did not see any

trace of sawdust, though I went for the purpose of finding some if there was any there. We might have been five or ten minutes looking for the sawdust. Thomas Bury was there at the time. He was mingling with us, but I could not say he was looking for sawdust.

When I first saw the branch or bough of osage orange it appeared to be right in the same place where it had lain for a number of months, with the exception of the portion that was sawed off.

We did not look for sawdust at any other place except where the sawed piece was found. We just looked for it on the ground where the sawdust would naturally fall from the piece being sawed there. Bury did not call our attention to any other place where he had sawed the limb. The bough might have been moved and placed right back where it was. I could not say as to that.

CROSS-EXAMINATION.

When we were in the lot north of Mrs. Southwood's place we———

There was grass on that lot, but it had been eaten and trampled by stock considerably. The whole place was covered over with eaten and dried grass. Mr. Lee Blasingame was there, Mr. Thornton, and Mr. Budd were there. We were asked in the presence, I think, of Mr. Thornton and Mr. Blasingame to go up and see whether or not we could see any sawdust where this log has been sawn through. Nobody told us that log had been dragged back and put in place before the jury came down there. I remember that the grass on each side of the sawn log was up around it as if it had never been disturbed. There was grass growing up

between these limbs. No one called our attention to it that they had ever been moved.

Charles J. Stillwell, a witness produced on behalf of the plaintiff, testified as follows:

I conduct a detective agency in this city. In company with A. N. Warnekros, a gunsmith of Fresno, I conducted a series of experiments there in the month of June, 1893, with a 41 Colt's, using both long and short cartridges, against a piece of cotton fabric, I think a piece of pillow slip. I have the piece of fabric with me—(witness produced it). The cloth was tacked up against a wooden upright in the basement of a building, and behind the fabric we placed a lot of stuffing from an old lounge and pressed hard to make about the same resistance, as we supposed, the resistance would be of a human body. At the point marked one foot on that fabric, when we fired at it with the pistol one foot away, the fabric immediately caught fire, and we had to put it out. I can't remember, but I think when fired at at one foot and a-half away, the fabric caught fire. The fourth and fifth did not catch fire. When we fired at the fabric at one foot away with a 41 long cartridge, it caught fire. It did not blaze, it smouldered.

CROSS-EXAMINATION.

That was dry and against a dry fabric. There was no moisture back of it, and no blood to spurt out.

I made these experiments during the Heath trial, as a detective in the employ of Mrs. McWhirter.

B. M. Hogue, a witness sworn on behalf of the plaintiff, testified as follows:

In August and September, 1892, I was residing in Fresno, and was a member of the coroner's jury who inquired into the death of L. B. McWhirter. I know Thomas Bury, the detective, by sight.

I went with the remainder of the coroner's jury to the McWhirter premises, on the last day of the inquest, and saw a certain gunnysack attached to the middle fence. It was of two thicknesses. My attention was called to a hole on the side of the sack nearest the fence. It was a small hole, I think about half an inch in diameter, and looked as if recently made. It was fresh. The sack looked as if it had been exposed to the weather for some time.

I also saw a bullet in a board in the corner of the chicken yard. The board, I think, was a pine board about 10 or 12 inches wide, about two feet in length, and an inch thick. The ball appeared to have a little upward tendency, and made a rip or scar in the board. My recollection is that the rip or scar appeared as if it had been recently done.

With the rest of the jury I also went into the vacant lot north of Mrs. Southwood's house, and saw a bough or branch of osage orange in the lot. Thomas Bury was present on that occasion. The object in going to the lot was to look for the sawdust made by sawing that bough or branch. We could not find any sawdust.

CROSS-EXAMINATION.

The grass around that bough which had been sawed had lain there for some time and made a perceptible mark on the ground. It is possible the butt of the

tree or branch might have been moved, but it was lying in its old original place. The top of it had not been moved. I don't remember any one saying that the tree had been moved away 25 or 30 feet and then carried back again. We looked around the tree for the sawdust. When the place between the two logs was pointed out to us to look for the sawdust, Mr. Blasingame was with us. I don't know that he pointed out the place particularly.

Lee Blasingame, a witness sworn on behalf of the plaintiff, testified as follows:

Q. When and from what person was the first time you ever knew or heard of the sawing by any person of that branch or bough of osage orange in the vacant lot adjoining Mrs. Southwood's house?

Mr. Budd—I object to that as incompetent and hearsay.

Objection overruled and exception.

A. From Mrs. Southwood and her daughter. At the time I replaced that limb in its original position I had been told by Mrs. Southwood that the log had been taken down there. I learned that it had been sawed before I replaced the bough to the best of my recollection.

CROSS-EXAMINATION.

The piece I carried back was all in one piece. I found out that Mr. Bury had sawed that tree after I had taken it back to its position. I took it back to ascertain the length of the piece that was cut out of it. If I answered Mr. Thornton that I learned that before I replaced the bough I answered incorrectly.

William O. Blasingame, a witness sworn on behalf of the plaintiff, testified as follows:

I am a brother of the plaintiff. I arrived in Fresno on the night of the Monday on which Mr. McWhirter met his death, and resided at my sister's house. I was present at the coroner's inquest all the time. I saw a gunnysack upon the fence which divides the chicken yard from the main yard. I don't know when that sack was put there, or who put it there. It was a whole sack. There was a hole on both sides, as though something went through—that is, making two holes in the sack, or one hole through the two. The hole on the side nearest the fence was about the size of between a dime and half a dime. The hole was round, and looked new. The hole on the north side of the sack was about the size of a quarter. The direction of the flight of the object which had caused those holes was downward. I subsequently discovered a bullet in a plank in the northwest corner of the chicken yard. It was a common pine board, about between two and three feet in length and 10 inches in width and one inch in thickness. The bullet had plowed a little furrow in the plank. The rip or scar was fresh; it was new. When I discovered that bullet I discovered it through a wire chicken coop standing in the corner. The bullet looked new to me.

Cross-Examination.

I saw no other holes in that sack. I found no other bullet holes there.

C. J. Lyons, a witness sworn on behalf of the plaintiff, testified as follows:

I knew Louis B. McWhirter in his lifetime, and also one Clem Carroll, and was present in Fresno when a primary election was held there about the first week in May, 1892.

Q. Did you see any assault made by the said Carroll upon McWhirter?

Mr. Campbell—We object to that, if your Honor please, on the ground that it is incompetent and irrelevant and immaterial.

Objection overruled and exception.

At the closing of the polls Mr. McWhirter had stepped out. He was in there about closing time; several parties were there. I heard McWhirter say, "Why did you strike me?" I stepped up then to McWhirter, and saw Clem Carroll pull a six-shooter on him. McWhirter said, "Why did you strike me?" and Carroll said, "I understand you have been talking about my relatives." McWhirter said, "I don't know you, or your relatives. I don't know what you mean." Then John Meares stepped up. I don't know what he says, and Carroll said for "him to give up his gun and I will give up mine." McWhirter said, "I have nothing to give up." There were a few more words spoken. Carroll backed out into the middle of the street, and then wheeled and went down Merced street. I did not see any pistol on McWhirter on that occasion.

John L. Meares, a witness sworn on behalf of the plaintiff, testified as follows:

I knew Louis B. McWhirter, and knew Clement Carroll by sight. I was inspector at the primary election held in Fresno in May, 1892.

Mr. Thornton—Q. Did you see any affray or assault between McWhirter and Carroll?

Mr. Campbell—Subject to the same objection as we took to the other.

Same ruling and exception.

Between 7 and 8 o'clock in the evening, and as I walked out of the place where we had the polls, I saw Mr. McWhirter standing like this, and as I walked up I heard him say: "Why did you strike me?" and I saw Carroll standing with a pistol in his hand leveled at McWhirter. I walked between them, and Carroll said: "Take McWhirter's pistol and I will give you mine." He said that several times, backing all the time.

I turned to McWhirter and asked him if he had a pistol.

Mr. Campbell—I object to that. It is hearsay testimony.

Objection overruled and exception.

Mr. McWhirter produced no pistol. In response to McWhirter's inquiry as to why he had struck him, Carroll said: "You have thrown us down."

Wm. F. Smith, a witness produced on behalf of the plaintiff, testified as follows:

I am an architect, and am accustomed to use carpenters' tools. The saw you present to me is in rather poor condition. It is a crosscut saw. I am also familiar with the filing and setting of the saws. About 7 and $\frac{7}{8}$ inches from the rear end of the saw there are two teeth that have been gouged—a piece of metal gouged out, and one piece that has been broken a

little. Those teeth would have no effect in sawing, or upon the material sawed.

Mrs. Elizabeth N. McWhirter, a witness sworn on behalf of the plaintiff, testified as follows:

Louis B. McWhirter is my son. I could have at any time on twenty-four hours' notice raised from $5000 to $10,000, if necessity required it, to assist my son. I remember my son making a draft on me for $1000 and $250. Before that he had not called on me for any money for several months—six or eight months, I think. Prior to his coming to California he lived at Nashville, Tennessee, and for two or three years before he left Nashville he at times gave me money. For the last three or four years while he was in Tennessee I don't think he called on me for any money.

CROSS-EXAMINATION.

My son was thirty-eight years old. I never furnished him with any money after his marriage.

The foregoing is the substance of all the testimony used on the trial of said action that is necessary to explain the questions raised by defendant's motion for new trial.

Be it further remembered, that after the arguments of counsel for defendant and for plaintiff, the Court gave the following instructions to the jury:

The Court—Gentlemen of the jury, the plaintiff, Mrs. Nannie S. McWhirter, sues the defendant, the Connecticut Mutual Life Insurance Company, for $15,000 upon a contract of insurance upon the life

of her late husband, Louis B. McWhirter, made payable to her as the beneficiary.

The execution of the contract, the payment of the premiums, and the death of the insured, are all conceded facts, and the only matters upon which you have to pass are the defenses which the defendant makes to the plaintiff's right of recovery.

These defenses are two-fold: First, that the insured committed suicide; second, that in applying for the insurance he fraudulently concealed facts which it was material the defendant should know.

Concerning the defense of fraudulent concealment, the defendant alleges in its answer that prior to making application for the insurance said Louis B. McWhirter had difficulties of a personal nature with certain persons, and said persons had threatened to murder him whenever opportunity offered; that said threats were believed by said Louis B. McWhirter, and he feared his life was in danger; and that he fraudulently concealed said facts from the insurance company, and that thereby the policy is rendered void and of no effect.

In the application for insurance the applicant made answer to numerous specific inquiries concerning his health, his personal and family history. Then followed a general question in words as follows: "Is there any fact relating to your physical condition, personal or family history or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?"

To which the insured answered "No."

I instruct you that the law is this: If a general question is put to the applicant for insurance, calling for information from him concerning any fact in his personal history which the insurance company ought to be made acquainted with, the concealment of a material fact will void the policy, though such concealment be the result of accident or inadvertence, and not of design, for it is the duty of the insured, in response to such general question, to disclose all material facts within his knowledge, and I leave it to you to determine: first, whether the said Louis B. McWhirter's life was threatened and in danger from the violence of others, and he knew that fact at the time he made the application; and, second, whether that fact was a material fact which should have been disclosed to the insurance company; and if you find that such threats had been made, and that such danger existed and he knew it, and that the facts so withheld from the knowledge of the insurance company were material facts, then your verdict should be for the defendant.

In considering the materiality of the information so withheld, if any there was, you are not to be guided or influenced by the fact that Louis B. McWhirter actually lost his life by violent means, but you are to determine the materiality of the facts by reference to the probable and reasonable effect upon the insurance company. Would the insurance company have been influenced by these facts in determining whether or not it would accept the risk and enter into the contract of insurance?

You are further instructed that any threats, the suppression or concealment of which by the deceased

would constitute a defense to this action, must be actual threats of bodily harm by third persons known to the deceased, and which would affect the fears and apprehensions of a reasonable man, and that mere rumor or apprehensions of the unlawful acts of personal or political enemies not amounting to tangible or specific threats of bodily harm or injury would not even if concealed from the defendant, constitute a defense to this action.

The applications upon which these policies of insurance were issued were made on November 19, 1891, and March 7, 1892.

The evidence on this branch of the case consists wholly in the declarations or admissions of Louis B. McWhirter himself, made subsequent to the time that these contracts of insurance were entered into. Witnesses testify that he made certain statements to the effect that on account of threats and dangers of death by bodily violence he has taken up the amount of insurance which he was then carrying upon his life.

Since these admissions were verbal I deem it proper to instruct you concerning the force and effect of that class of evidence.

A standard authority upon evidence says: "With re-
" spect to verbal admissions, it may be observed that
" they ought to be received with great caution, the
" evidence consisting, as it does, in the mere repetition
" of oral statements, is subject to much imperfection
" and mistake, the party himself either being misin-
" formed, or not having clearly expressed his own
" meaning, or the witness having misunderstood him.
" It frequently happens, also that the witness by un-

" intentionally altering a few of the expressions really
" used gives an effect to it completely at variance
" with what the party actually did say. But where
" the admission is deliberately made and precisely
" identified, the evidence it affords is often of the most
" satisfactory nature.

" The burden of proof of the allegations of fraudu-
" lent concealment rests upon the defendant, and
" must be established by a preponderance of evidence.

" The evidence in support of the defense of suicide
" consists wholly of circumstances."

You have before you the undisputed fact that Louis B. McWhirter was found wounded to death, lying in the rear yard of his residence. At his side was a revolver, with three discharged cartridges. In the fence opposite were found the marks of the bullets, apparently fired from a point near where he fell. In a corner of the yard was found another pistol, with three discharged cartridges. Near the latter pistol were found a mask and two clubs, around one of the clubs was a rope fastened in place by a nail.

Near the same point were three bullet marks, which could have been made by a person standing at a certain point and without changing the position of his feet.

You, as reasonable men, dealing with these circumstances in the light of your observation and experience, and the motives which control human action, are to take these facts, and such other facts testified to as you find to be true, and therefrom decide whether or not the preponderance of the evidence indicated that Louis B. McWhirter came to his death by suicide.

You are to consider in that connection the evidence concerning the rope, the sawdust and the nails. If

you believe from the evidence that the rope found on one of the clubs was cut from rope belonging in the McWhirter yard, you may take that fact into consideration as aiding in some degree to decide whether the rope was cut and placed there by McWhirter, or was cut and placed upon the club by some other person.

You are to consider all of the evidence concerning the finding of the sawdust; the persons by whom found, the nature of the sawdust, and the sawdust found upon the saw.

If you believe from the evidence that the clubs found in the yard were sawed in the premises of McWhirter and by his saw, those are strong circumstances to connect McWhirter with the preparation of these weapons.

There are other circumstances antecedent to the death, none of which would be sufficient in itself to prove suicide, but all of which may be taken into consideration in determining the question which is submitted to you. Such are the facts, that the said Louis B. McWhirter insured his life at the time and for the amounts as shown in the evidence; the declarations he made concerning his expectation of death; the declarations he made concerning his wishes regarding the education of his child in case of his death; the fact—if you find it to be a fact—that on the day preceding his death he was unusually affectionate towards his child; the fact that he left a letter of instructions upon the same subject; the facts concerning his financial condition; the fact that he was under indictment for misdemeanor, and the effect thereof upon his mind and spirit; but the existence of the indictment

and its effect must be considered in the light of the presumption of the law that he was innocent of the charge.

Concerning the letter of instructions written by Louis B. McWhirter in July, 1892, and delivered to Mrs. McWhirter after his death, all the information offered in evidence consists in the statement that it was a letter of instructions as to what was to be done in regard to the education of the child after his death, or in case of his death.

Mrs. McWhirter, when placed upon the witness stand by the defendant, testified that she had received such a letter, and that the same was lost. She was not asked what were the contents of the letter by either party to the suit. You are not to draw any inference against the defendant from the failure of the defendant's counsel to ask for the contents of the letter, or from the failure of the plaintiff's counsel to offer the contents in evidence. You may only draw such inference as you deem reasonable from the fact that such a letter of instructions was written under the circumstances.

Such a letter is in itself proof that McWhirter contemplated death as possible or likely to occur.

It is in itself proof of preparation for death similar in nature and degree to the making of a will or other testamentary expression of the wish of the decedent. Its value as a circumstance in this case depends upon its proximity to the death, and such connection as you may find it to have had with the other evidence which you may think points toward the theory of suicide.

It is for you to say whether it was a paper prepared as a testamentary instrument expressing Mr. McWhirter's general wish concerning the education of his child, in the contingency of his own death, or whether it was inspired by a fear of death from the violence of others, or whether it was prepared in contemplation of suicide, and you are authorized in this connection to consider the fact that Mrs. McWhirter at one time requested her friend Mrs. Lane not to mention the existence of the letter.

On the other hand, you are to take into consideration the evidence touching the physical condition of Louis B. McWhirter, his health, his temperament, his spirits, his ambition, his social and family relations. You are also to bear in mind the evidence concerning the tracks found in the alley by the witness Babcock and others; the evidence concerning the number of shots fired at the time of the death.

If you find from the evidence that any person other than Louis B. McWhirter was present and participating in the shooting, or was present and participating in any way in the transaction, or if you find that more than six shots were fired upon that occasion, at that time and place, then in either such case I instruct you that the evidence is insufficient to support the defense of suicide.

There is testimony from several witnesses that a groan, as of one in pain, was heard just prior to the last three shots. If you believe from the evidence that the groan was the groan of Louis B. McWhirter, and was caused by the shot, or pain of the shot which caused his death and if you also believe from the evidence that subse-

quent to the shot which caused his death three shots were fired at that time and place, then I instruct you that the other evidence is insufficient to support the defense of suicide.

There is evidence that Louis B. McWhirter had two pistols. It is based wholly upon the testimony of Mrs. McWhirter. Her testimony taken upon the Heath trial has been read before you, and you will remember its purport. She testified to another pistol besides the one taken by Mr. McWhirter from the house on the morning of his death, but she says one of these pistols had been presented by McWhirter to her brother.

There are several instructions counsel have asked, some of which I will give you.

You are the sole judges of the effect and value of evidence, except where the same is declared to be conclusive; and that you are the judges of the credibility of the witnesses.

That your power of judging of the effect of evidence is not arbitrary, but has to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

It is the law that a witness false in one part of his testimony is to be distrusted in others.

The evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict.

If weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered is to be viewed with distrust.

The question as to whether or not Louis B. McWhirter did or did not commit suicide is a question of fact, and that you are to determine from the evidence given in this case, and by no other means.

If you believe from the evidence that the said Louis B. McWhirter did commit suicide, then it is your duty under your oaths to find a verdict for the defendant, and in arriving at that conclusion, you are to consider all of the circumstances surrounding the said McWhirter at the time of his alleged death, and take into consideration whether they were such as would or would not induce a man of ordinary intelligence and understanding to take his own life.

In weighing the evidence given by the witnesses upon the stand, you should take into consideration their interest in the subject matter of the controversy; whether they have any interest in the result of your verdict, whether they are related to any parties in the action, and whether it would or it would not be to their benefit if your verdict should be one way or the other.

You are instructed that the real issue in this case, and the one upon which the burden of proof lies upon, the defendant, the insurance company, is whether Louis B. McWhirter killed himself, and not whether any other particular person killed him. If any other person than himself killed McWhirter, the plaintiff is entitled to recover.

The presumption of law is, that Louis B. McWhirter, the decedent, did not kill himself, and the plaintiff is entitled to the benefit of that presumption until the same has been overcome and rebutted by satisfactory evidence.

You are instructed that if Louis B. McWhirter was killed by an accidental discharge of either of the pistols found near his body, at or after his death, the plaintiff is entitled to recover.

You are hereby instructed that the testimony of witnesses apparently inconsistent is always to be so construed, if possible, as to exempt them from the imputation of perjury. Affirmative testimony is from its nature generally of greater weight and better entitled to weight, than negative, and the want of means and opportunity of the witness of knowing the matters in controversy, his actual inattention, the absence of circumstances likely to excite his attention, or the existence of circumstances likely to divert it, are considerations which greatly diminish the effect of negative testimony.

You are further instructed that the evidence of persons who have testified that they heard six shots, but who decline to testify or affirm upon oath that no greater number than six shots were fired is not of equal weight, and should not receive as great an amount of credit at your hands as the testimony of persons of equal credibility and fairnesss who swear distinctly and positively that they heard seven shots fired, and counted them at the time of the firing, or of persons who heard seven shots fired and united in counting their number with persons at the time engaged in counting the same.

You are further instructed that the entire theory of defense in this case is based upon the assumption that Louis B. McWhirter prepared the clubs and the mask found upon his premises shortly after the killing; that six and only six shots were fired on that occasion; that five and only five were fired onto the fences and outhouses upon the premises; and that McWhirter fired the sixth into his own body and through his own heart, which caused his death. This theory of defense is founded upon the allegation that McWhirter prepared the surroundings to indicate a sham assassination or scene of murder, and then killed himself. If you should find that Louis B. McWhirter did not make such preparations; that he did not saw the club found upon his premises; that he did not prepare the mask; that he did not own or possess both pistols; and that he did not fire all the shots, the bullet holes of which are found in the fence and outhouses and on his own body; your verdict should be for the plaintiff.

You are further instructed that you are at liberty to consider under the law your own experience and observation as to what would be the effect of the discharge of a revolver such as either of the pistols offered in evidence in this case when held by a person and discharged against his own body, in regard to the burning of clothing, powder marks, and the blowing out or ripping of flesh by the explosive force of the gunpowder.

You are to take that in connection with all of the testimony upon the effect of the shooting, and the experiments you saw made, and gain such light as you can from all the circumstances in regard to the pow-

der marks on the garments, if you find there are any such—such light as you think you can obtain from that source.

You are hereby further instructed that evidence is not sufficient to maintain the issue of suicide on behalf of the defendant which does not clearly preponderate upon the defendant's side of that issue. That it is not sufficient to maintain the burden of proof on the part of the defendant, to produce evidence which is equally consistent with the theory or fact of suicide or murder. Evidence is not sufficient to sustain the burden of proof or maintain the affirmative of an issue from which it appears that a man may or may not have committed suicide with equal plausibility or consistency. The evidence must distinctly and clearly preponderate in favor of suicide and not of murder.

You are instructed that by satisfactory evidence, sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.

You are instructed that the evidence of the men of science called by the plaintiff is to the effect that there is no evidence of burning or charring of the fabric of the garments worn by McWhirter at the time he received his death wound, nor any presence of powder or

particles thereof in or upon his said garments. In this state of the evidence, you are at liberty to rely upon the evidence of such experts, coupled with the results of your own experience and observation.

You are instructed that the evidence of men of science called by the plaintiff is to be taken into consideration, remembering, however, that you are not bound by the statements of men of science in cases of this kind. I think the law on that subject is expressed in some instructions which I will read to you.

You are further instructed that certain portions of the testimony given in this case was the opinion of experts in relation to the stains upon the garments introduced in evidence. I instruct you that expert testimony should be received and acted upon with great caution, for the reason that it is simply the opinion of the witness under oath, and not the statement of a fact.

The testimony of an expert is simply an expression, under oath, of the opinion which he entertains, and the jury are not bound by it any further than it coincides with their own opinions based on their examination of the articles, or on such credit as they may give to it on account of the experience of the expert.

Something has been said in the argument in regard to the Heath case. You are to try this case regardless of any other case. The Heath case has nothing to do with your verdict. Your verdict has no effect on the trial of the Heath case. He is not a party to this proceeding. He has not had a hearing in this case, and the proceedings against him had nothing to do with your deliberations.

Mr. Thornton—Plaintiff excepts to the general charge of the Court on the ground that the law, as given by the Court, in regard to the fifteenth question set forth in the application, and the plaintiff's answer is erroneous in this: that the question asks for the opinion of the insured, upon which a charge of fraud or murder concealment cannot be predicated; that the question is too general, and therefore incapable of an answer; that a complete biography would not satisfy the question, and no man ever could be insured who would answer that question inaccurately. The plaintiff likewise excepts to the instruction of your Honor upon that same subject. The instruction is not clearly limited to apprehensions based upon knowledge or threats made prior to the execution of the application for the policy in controversy. I ask your Honor to instruct the jury that the knowledge of these threats and apprehensions must have existed respectively prior to the 18th day of November, 1891, and on the 7th day of March, 1892. I ask that that qualification be expressly given.

The Court—I meant to tell you, gentlemen, that these threats must have existed prior to the time of entering into the contract of insurance. You are to find whether or not they did, from what he said afterwards. That is the only light you have upon the subject. It does not necessarily follow that because he said he had taken out the amount of insurance that he had, or was carrying so large an amount on account of threats of personal violence, that those threats had existed when this particular policy was taken out. He might have heard threats after those

policies were taken out, and increased his amount of insurance on account of threats. You are to take all he said on that subject into consideration, and find whether or not his statement in regard to the threats, and the reason for taking out the policies, applied to this policy, as well as the others. You will take that instruction in connection with the other instructions which I gave you on the same subject.

Mr. Campbell—The defendant desires formally to except to your Honor's instruction in relation to the evidence being insufficient, where the same appears, to sustain our contention of suicide. We further take exception to the last instruction just given, on the ground that all the evidence goes to show that the deceased, Louis B. McWhirter, said that all of his insurance was taken out for the express purpose and with the express idea that he was in danger of his life, and he went further, and stated in the face of the application, that each and every one of the insurance companies knew of the risk that they were taking.

Mr. Thornton—Shall we take our exceptions to specific instructions.

The Court—No, you may state your exceptions afterwards. Gentlemen, endeavor to harmonize your views on this subject, and render a verdict. There are only two verdicts you can render. You may render a verdict for the plaintiff for the full amount sued for; you cannot render a verdict for less than the amount sued for, unless you render a verdict for the defendant. If you render a verdict for the defendant, I suggest that you state on which of the defenses you find it, if you do find for the defendant.

Mr. Campbell—May we be allowed an exception to that?

The Court—Yes.

Mr. Thornton—Will your Honor instruct the jury that there is no question about amount; that we are entitled to fifteen thousand dollars, and seven per cent. interest? It is not named in the complaint, and must be stated specifically.

The Court—I have inserted in one form of verdict the amount that you claim.

Be it further remembered, that the defendant also requested the Court to give the following instructions to the jury:

Gentlemen of the Jury, the issues made by the pleadings in this case are as follows:

1. Did Louis B. McWhirter, on the 28th day of August, 1892, commit suicide, or die by his own hand?

2. Was Louis B. McWhirter, on said date assassinated?

3. Was there a breach of warranty of the contract of insurance entered into between said Louis B. McWhirter and the defendant, the Connecticut Mutual Life Insurance Company?

4. Was Louis B. McWhirter guilty of fraud in concealing certain material facts from said insurance company which were material to said contract—that is, which would have increased the hazard of said insurance, or the premium to be paid by said Louis B. McWhirter.

Which said instruction numbered (—), the Court refused to give, to which the defendant duly excepted.

IX.

In instructing you that a witness false in one part of his testimony is to be distrusted in others, I call your attention to the testimony of Lee Blasingame, a witness produced on behalf of the plaintiff. If you believe from the evidence that the said Lee Blasingame has testified in any particular to anything which is wilfully false, then I instruct you that the remaining part of his evidence is to be received with distrust.

Which said instruction, numbered IX, the Court refused to give, to which the defendant duly excepted.

X.

A great deal has been said during the trial and in the argument of counsel in relation to a certain letter, which the plaintiff admits having been given her after the death of her husband, and which was written to her by her husband concerning her action after his death. It is for you, gentlemen, in view of all the circumstances surrounding the case, to determine whether or not it was the duty of the plaintiff to have divulged the contents of that letter.

If you believe from the evidence that said letter contained evidence that the deceased, Louis B. McWhirter, committed suicide, and that said evidence was in the possession of the said plaintiff, then I instruct you that it was her duty to have made said fact known to the defendant insurance company, upon an application being made to her for such information, if you believe any such application was so made, and if you believe from the evidence that she did receive such a letter, and that she neither produced said letter

nor testified to its contents when upon the stand, then you are to presume for the purposes of this case that if such letter was produced, it would be evidence against the plaintiff in said case, for the law presumes that evidence, wilfully suppressed, would be adverse if it were produced, and that higher evidence would be adverse from inferior being produced, and I instruct you that the letter itself would be the best evidence of its contents.

Which said instruction, numbered X, the Court refused to give, to which the defendant duly excepted.

XI.

In the applications which have been introduced in evidence, the following questions were asked of the deceased, and the following answers given by the deceased:

"Is there any *fact* relating to your physical condition, *personal*, or family history or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?" The answer to that question was "No."

And, furthermore, it was by the terms of said policies and applications agreed that the questions and answers were a warranty, and that each and every answer to each and every question was true.

If you believe from the evidence in this case that at the time of the application for insurance made by said Louis B. McWhirter, and at the time of the delivery of the policies of insurance, which are the subject matter of this controversy, said Louis B. McWhirter had been threatened, or was apprehensive of being

assassinated, then I instruct you that such facts were a part of the personal history of said Louis B. McWhirter, and should have been communicated to the defendant insurance company, and the failure to so communicate them voids the policy, and you should find a verdict for the defendant.

(By the Court—Given elsewhere.)

Which said instruction the Court refused to give, to which the defendant duly excepted.

"XII.

"The question and answer referred to in the instruction numbered XI were a warranty upon the part of the said Louis B. McWhirter that there was no fact in his personal history that would increase the hazard or increase the premium of said insurance, and you are instructed that the only question for you to determine is as to whether or not said warranty was true. It makes no difference whether said representation was material or not; if you find from the evidence that the same was untrue, then it is your duty to find a verdict for the defendant."

(By the Court—Denied.)

Which said instruction, numbered XII, the Court refused to give, to which the defendant duly excepted.

"XIII.

"Warranties are a part of the contract of insurance upon which the insurer as well as the insured has a right to rely, and if you find from the evidence that the deceased, Louis B. McWhirter, in answer to the question asked him as to whether or not there was any fact in his personal history which

said company ought to know, said "No," then I instruct you that if it were a fact, and if you so find from the evidence that prior to the time of said application and said answer, the said Louis B. McWhirter had had difficulties with certain persons who threatened his life, and that he was then apprehensive of assassination, that was such a fact as he should have communicated to said company, and his failure to communicate such fact to the said company was a breach of the warranty contained in said application, and you should find a verdict for the defendant."

(By the Court—Denied.)

Which instruction, numbered XIII, the Court refused to give, to which the defendant duly excepted.

"XIV.

"If you find from the evidence that the defendant, Louis B. McWhirter, prior to the application for insurance in these cases, to-wit: December................1891, and March................1892, had had difficulties, political and personal, and his life had been threatened, and that he was then apprehensive of being assassinated, and that he concealed said fact in said application from said defendant insurance company, then I instruct you that said Louis B. McWhirter was guilty of fraud in concealing said facts from said company, and it is your duty to find a verdict for the defendant.

(By the Court—Given elsewhere.)

Which said instruction, numbered XVI, the Court refused to give, to which the defendant duly excepted.

"XV.

"A neglect to communicate that which a party knows and ought to communicate is called a concealment. A concealment, whether intentional or unintentional, vitiates the policy, and if you find from the evidence in this case that Louis B. McWhirter's life had been threatened, and that at the time of the applications for said insurance, or the deliverance of the policies of insurance, he concealed said fact from the defendant insurance company, then it is your duty to find a verdict for the defendant."

(By the Court—Given elsewhere.)

Which said instruction, numbered XV, the Court refused to give, to which the defendant duly excepted.

" XVI.

" The materiality of the concealment is to be determined not by the event, but by the probable and reasonable influence upon the party to whom the communication is due in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries; and if you believe from the evidence in this case that the concealment—if you find that there was any—practiced by the said Louis B. McWhirter in obtaining the insurance from the defendant would have had any influence upon the defendant in issuing to him its policies, then I instruct it is your duty to find a verdict for the defendant."

(By the Court—Given already.)

Which instruction, numbered XVI, the Court refused to give, to which the defendant duly excepted.

Whereupon the jury, having retired, subsequently and on the 8th day of February, A. D. 1894, returned the following verdict on the issues submitted to them:

"We, the jury, find for the plaintiff in the sum of $16,137.50.

J. J. VASCONCELLOS,
Foreman."

Be it remembered, that thereafter, and to-wit: on the 17th day of February, A. D. 1894, the defendant in the above-entitled action duly served and filed the following notice of motion for new trial:

To the plaintiff above-named, and to Messrs. Thornton & Merzbach, and Thompson & King, her attorneys:

You will please take notice, that the defendant above-named intends to move the Court to set aside and vacate the verdict of the jury, and grant a new trial herein upon the following grounds:

I.

Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

II.

Misconduct of the jury.

III.

Newly-discovered evidence material for the defendant, which it could not, without reasonable diligence, have discovered and produced at the trial.

IV.

Insufficiency of the evidence to justify the verdict.

V.

That the verdict is against law.

VI.

Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon a bill of exceptions to be hereafter prepared and settled, upon affidavits and upon the minutes of the Court.

And you are further notified, that said motion will be made on the 26th day of February, 1894, at the opening of Court on that day, or as soon thereafter as counsel can be heard, or if the bill of exceptions is not settled on said day, said defendant will apply to the Court to continue said motion until said bill of exceptions be settled, and if said motion cannot be heard on the 26th day of February, 1894, said motion will be made on the next succeeding motion day at which it can be heard and notice thereof will be given.

The defendant makes the following assignment of errors as having been committed during the trial of said cause, which were duly excepted to by the defendant at the time:

I.

The Court erred in excluding the deed from Miss N. S. Blasingame to J. A. Lane, and in not allowing the same to be given in evidence.

II.

The Court erred in allowing the witness, Dr. Pedlar, to answer the following question:

"Q. What would have been your estimate or opinion of his personal strength."

III.

The Court erred in overruling defendant's objection to the question asked the witness Babcock:

"Q. Did he inspect the seventh bullet hole concerning which you have testified through the gunnysack."

IV.

And also the question asked the same witness: "Were you acquainted with Bury."

V.

The Court erred in overruling defendant's motion to strike out the evidence of the witness Babcock in relation to the hole in the gunnysack having the appearance of a bullet hole.

VI.

The Court erred in sustaining plaintiff's objection to the question asked the witness, Thomas Rhodes, as follows: "Did you hear George Rupert at the time that one of those pistols was picked up state that it was the pistol of Louis B. McWhirter?"

VII.

The Court erred in sustaining plaintiff's objection to the question asked the witness, Mrs. J. A. Lane: "What, if anything, did she say to you about his being affectionate, particularly on that day?"

VIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Mrs. W.

D. Crichton: "What, if anything, did she tell you at that time and place in relation to what she had seen?"

IX.

The Court erred in sustaining plaintiff's objections to the following question asked the witness, H. H. Welch: "Please state to the jury what it was she stated she saw at that time and in the same presence?"

X.

The Court erred in sustaining plaintiff's objection to the following question asked the same witness: "Did she at the time and at the place mentioned and in the presence of the persons stated, tell you that she had looked out of the window, and at the last shot had seen Mr. McWhirter fall?"

XI.

The Court erred in sustaining plaintiff's objection to the following question asked the same witness: "Did she at that time and in the presence of the Sheriff of the county, and Thomas Bury and Mrs. McWhirter, state to you that she had looked out of the window, and that she saw something white fall, and heard nobody run away and no noises?"

XII.

The Court erred in overruling defendant's objection to the following question asked the witness, Thomas Bury: "You were in constant consultation with the attorneys for the defendant?" (referring to the Heath case during the trial).

XIII.

The Court erred in overruling defendant's objection to the following question asked the witness, G. H. Bernard: "What was said—by whom and to whom?"

XIV.

And in overruling defendant's objection to the following question asked the same witness: "What, if anything, did Philip Scott, at that time and place, say about sawdust?"

XV.

The Court erred in sustaining plaintiff's objection to the following documents produced by the witness, Seaver:

"San Francisco, September 1st, 1892.

"To Colt's Fire Arms Company,

"Hartford, Conn.

"When and to whom did you invoice forty-one double-action revolver, No. 88,031? Answer by telegram immediately."

"Colt Patent Firearms Company."

"Hartford, Conn.

"To Colt's Arms Co.,

"San Francisco, Cal.

"88,030 sent you May 5th, 1892.

"Colt Arms Co."

XVI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, W. A. Seaver: "Can you state to this jury whether or not in the month of May, at any time, you received an invoice of

pistols similar in kind and character to that which you now hold in your hand, and if so, how many?"

XVII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, W. A. Seaver: "Now, then, I will ask you whether or not on the 7th day of June, if you can tell, you sold and delivered a pistol exactly similar in kind and character to the firm of Clabrough, Golcher & Co., in the City and County of San Francisco, who have their present business in the Grand Hotel Building, between New Montgomery and Second streets—that is, within 500 feet of the Palace Hotel."

XVIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, E. F. Bernhard, "Did you have any conversation with Mr. McWhirter in returning from that banquet in relation to suicide, or anything of that kind."

XIX.

The Court erred in refusing to permit the following question asked by counsel for defendant, to be answered by the witness, D. L. Davis: "I will ask you whether or not in that saw at that time there was a tooth that fitted into the cuts or curves of this osage orange.

XX.

The Court erred in not permitting the counsel for defendant to ask the following question of the same witness: "Whether or not at the time when you were called in by the District Attorney of the county he

made an examination of the saw and fitted the teeth into these cuts or curves of this osage orange where it had been sawed."

XXI.

The Court erred in refusing to allow defendant to prove by the witness, D. L. Davis, the manner in which he fitted it and the result.

XXII.

The Court erred in sustaining defendant's objection to defendant's offer to prove by the witness Golcher, of the firm of Clabrough, Golcher & Co., that the pistol was received by them on the 7th of June, from the agent of the Colt's factory, and sold on that day.

XXIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, E. F. Bernhard: "I will ask you whether or not in the spring of 1889, you had a conversation with the deceased, L. B. McWhirter, in relation to suicide, and if so, what that conversation was."

XXIV.

The Court erred in excluding the following testimony of the witness, E. F. Bernhard:

Mr. Campbell—Q. Can you now fix the date of your conversation with Mr. McWhirter as near as possible?

A. I think it was in the spring of 1889.

Q. The spring of 1889? A. I think so.

Q. Now will you please state what, if anything, Mr. McWhirter said to you in relation to suicide or in re-

lation to under what circumstances he would commit suicide?

A. The exact conversation I could not state at this time, but to the best of my recollection it was this, that if he ever did anything that would disgrace himself or his family, that he would kill himself, or that he would kill himself if he ever did anything that would bring disgrace upon him or his family.

Q. Is that the substance of the testimony?

A. That is the substance.

Q. Where had you been that evening, if you remember?

A. We had been to a little entertainment at Mr. Grady's residence.

Q. You were coming home together, were you?

A. We were coming together. We left together—we walked from Mr. Grady's residence to this point.

Q. That was the substance of what he told you?

A. Yes sir.

The Court—You might state in what connection this conversation arose.

A. We were discussing, to the best of my recollection, some of the history, you might term it, of another person, and in that connection this conversation arose out of that.

The Court—That is all. I think the ruling is correct.

Mr. Campbell—I was going to make the following offer: To re-offer this testimony in connection with the testimony that was offered this morning, of Mr. Chapman with the record.

Objection sustained and defendant excepts.

XXV.

The Court erred in refusing to allow defendant to re-offer the testimony of E. F. Bernhard in connection with the testimony of the witness Chapman, and the record.

XXVI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Richard S. Heath: "State to the jury whether or not you killed Louis B. McWhirter."

XXVII.

The Court erred in refusing to allow counsel for defendant to ask the same question of Judge Harris, Superior Judge of Fresno County.

XXVIII.

The Court erred in refusing to allow counsel for defendant to ask the same question of Reel B. Terry.

XXIX.

The Court erred in refusing to allow counsel for defendant to ask the same question of Mr. Grady, the attorney.

XXX.

The Court erred in refusing to allow counsel for defendant to ask the same question to Senator Goucher.

XXXI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Richard S. Heath: "Is your trial still pending."

XXXII.

The Court erred in granting plaintiff's motion to strike out the following answer of the witness, O. N. Chaffee: Mrs. McWhirter, I think, on the 18th of October, the same day, stated that they had detectives out at work, trying to find out who murdered Mr. McWhirter; that they had facts in their possession; that they had traced out a great many reports which had been made alleging that this was a suicide, and that in every case they had traced them home to parties who were raising the suicide theory.

XXXIV.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, O. M. Chaffee: "Did Mrs. McWhirter at that time say anything to you about having received a letter of instructions or received instructions from her husband as to what to do in case of his death."

XXXV.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "I wanted to ask her whether anything was said between herself and her husband."

XXXVI.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "How often, Mrs. McWhirter, did you and Mr. McWhirter discuss and talk over the subject of training and education of your child."

XXXVII.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "About how often."

XXXIX.

The Court erred in overruling defendant's motion to strike out the following answer of the witness, John S. Eastwood: "It seems to me that I heard a groaning sound."

XL.

The Court erred in denying defendant's motion to strike out the following answer of the witness, W. L. Raims: "It is my opinion that the first two shots could not have been fired out of the same pistol."

XLI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Hume: "Do you know on what Mr. Thacker's opinion as to the suicide is based?"

XLII.

The Court erred in overruling defendant's objection to the following question asked the witness, J. E. Baker: "What was his general conduct and exhibition of sentiment towards his child?"

XLIII.

The Court erred in overruling defendant's objection to the following question asked the witness, Dr. E. G. Deardorff: "Did he not so inform you."

XLIV.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Dr. Deardorff: "Did you not testify upon that coroner's inquest that you examined Mr. McWhirter upon March 18th for the New York Life Insurance Company, and on March 23rd for the Providence Life Insurance Company, and he stated to you at that time: "I have a good many political enemies and I expect really that my life will be attempted or that I will be killed before the campaign closes."

XLV.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, J. E. Baker: "Did he not tell you that he was apprehensive of being assassinated, and for that reason he carried $60,000 in life insurance."

XLVI.

The Court erred in overruling defendant's objection to the following question asked the witness, Dr. E. G. Webb: "In the first instance in which the clothing was set on fire, what was the nature of the garment, and under what circumstances—was the———"

XLVII.

The Court erred in overruling defendant's objection to the following question asked the witness, Dr. E. G. Webb: "What was the nature of the weapon in the cases you have observed."

XLVIII.

The Court erred in overruling defendant's objection to the following question asked the witness, W. J. Tin-

nin: "Was there anything unusual or different from the ordinary or usual talk of Mr. Louis B. McWhirter on the 28th of August."

XLIX.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, W. J. Tinnin: "He had told you that before that time, had he not."

L.

The Court erred in overruling defendant's objection to the following question asked the witness, Lee Blasingame: "When and from what person was the first time you ever knew or heard of sawing by any person of that branch or bough of osage orange, in the vacant lot adjoining Mrs. Southwood's house?"

LI.

The Court erred in overruling defendant's objection to the following question asked the witness, John L. Meares: "Did you see any affray or assault between McWhirter and Carroll?"

LIII.

The Court erred in overruling defendant's objection to the answer of the witness: "I turned to McWhirter, and asked him if he had a pistol."

LIV.

The Court erred in charging the jury in relation to the sufficiency and insufficiency of the evidence to sustain the defense of suicide, and the defendant specifies the particular portions of the charge so erroneous, as follows:

"If you find from the evidence that any other person than Louis B. McWhirter was present and participating in the shooting, or was present and participating in any way in the transaction, or if you find that more than six shots were fired upon that occasion at that time and place, then in either such case I instruct you that the evidence is insufficient to support the defense of suicide.

"You are further instructed that the entire theory of the defense in this case is based upon the assumption that Louis B. McWhirter prepared the clubs and the mask found on his premises shortly after the killing; that six and only six shots were fired on that occasion; that five and only five were fired into the fences and outhouses upon the premises, and that McWhirter fired the sixth into his own body and through his own heart, which caused his death. This theory of the defense is founded upon the allegation that McWhirter prepared the surroundings to indicate a sham assassination or scene of murder and then killed himself. If you should find that Louis B. McWhirter did not make such preparations, that he did not saw the club found upon his premises, that he did not prepare the mask, that he did not own or possess both pistols, and that he did not fire all the shots, the bullet holes of which are found in the fences and outhouses and on his own body, your verdict should be for the plaintiff.

LV.

The Court erred in charging the jury in relation to the defense of fraudulent concealment, and the defendant specifies the particular portion of the charge so erroneous, as follows:

I meant to tell you, gentlemen, that these threats must have existed prior to the time of entering into the contract of insurance. You are to find whether or not they did, from what he said afterwards. That is the only light you have upon the subject. It does not necessarily follow that because he said he had taken out the amount of insurance that he had, or was carrying so large an amount on account of threats of personal violence, that these threats had existed when this particular policy was taken out. He might have heard threats after those policies were taken out, and increased his amount of insurance on account of threats. You are to take all he said on that subject into consideration, and find whether or not his statement in regard to the threats, and the reason for taking the policies, applied to this policy as well as the others. You will take that instruction in connection with the other instructions which I give you on the same subject.

LVI.

The Court erred in charging the jury in relation to the amount of the verdict, and the defendant specifies the particular portions of the charge so erroneous as follows:

"Gentlemen, endeavor to harmonize your views on this subject, and render a verdict. There are only two verdicts that you can render. You may render a verdict for the plaintiff for the full amount sued for; you cannot render a verdict for less than the amount sued for, unless you render a verdict for the defendant. If you render a verdict for the defendant, I suggest that you state on which of the two defenses you find it, if you do find for the defendant."

LVII.

The Court erred in refusing to give the instruction numbered "O" requested by the plaintiff.

LVIII.

The Court erred in refusing to give the instruction numbered IX, requested by the plaintiff.

LIX.

The Court refused to give the instruction numbered X, requested by the plaintiff.

LX.

The Court erred in refusing to give the instruction numbered XI, requested by the plaintiff.

LXI.

The Court erred in refusing to give the instruction numbered XII, requested by the plaintiff.

LXII.

The Court erred in refusing to give the instruction numbered XIII, requested by the plaintiff.

LXIII.

The Court erred in refusing to give the instruction numbered XIV, requested by the plaintiff.

LXIV.

The Court erred in refusing to give the instruction numbered XV, requested by the plaintiff.

LXV.

The Court erred in refusing to give the instruction numbered XVI, requested by the plaintiff.

The defendant hereby specifies the following particulars wherein the evidence is insufficient to justify the verdict.

I.

That all of the evidence given upon the subject, without any contradiction whatever, shows that the deceased, Louis B. McWhirter, at the time of making application for the insurance—the subject matter of this action—had been threatened with assassination, and expected to be killed or assassinated, and that he concealed said facts from the defendant here; and that said concealment thereby became and was a breach of the warranty in the application for insurance made and signed by said Louis B. McWhirter, and was and is a fraudulent concealment under and by virtue of the statute of California.

In commemoration of all of which this............ day of................1892, and within the time allowed by law and the order of this Court, the defendant presents this, its bill of exceptions, and prays that the same may be settled and allowed as correct and signed by the Judge of said Court.

JAMES H. BUDD,
REDDY, CAMPBELL & METSON,
Attorneys for Defendant.

The foregoing bill of exceptions is correct, and as such is settled and allowed.

W. B. GILBERT,
Judge.

Dated May 23, 1894.

Due service of within is admitted this 5th day of April, 1894.

THORNTON & MERZBACH,
Attorneys for Plff.

[Endorsed]: Filed April 5th, 1894. W. J. Costigan, Clerk. Re-filed after settlement as Bill of Exceptions, May 23, 1894. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

NANNIE S. McWHIRTER,
Plaintiff,
vs.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.

At Law. Petition for Writ of Error.

The defendant, Connecticut Mutual Life Insurance Company, feeling itself aggrieved by the judgment made and entered by said Court on the 9th day of February, 1894, against defendant and in favor of plaintiff, now comes the said defendant, by its attorneys, James H. Budd and J. C. Campbell, and petitions said Court for an order allowing this defendant a writ of errors from the judgment herein, to the Honorable Court of the United States, Circuit Court of Appeals, for the Ninth Circuit, sitting at the City of San Francisco, State of California, and according to the laws of the United States in that behalf made and

provided, and also that an order be made fixing the security which defendant shall furnish upon said writ of error.

And your petitioner will ever pray, etc.

JAMES H. BUDD and
J. C. CAMPBELL,
Attorneys for Defendant.

[Endorsed]: Filed August 7, 1894. W. J. Costigan, Clerk. By W. S. Beaizley, Deputy Clerk. James H. Budd and J. C. Campbell, Attorneys.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

Nannie S. McWhirter,
Plaintiff,
vs.
Connecticut Mutual Life Insurance Company,
Defendant.

At Law. Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which, it avers, occurred upon the trial of the cause, to-wit:

I.

The Court erred in excluding the deed from Miss N. S. Blasingame to J. A. Lane, and in not allowing the same to be given in evidence.

II.

The Court erred in allowing the witness, Dr. Pedlar, to answer the following question:

"Q. What would have been your estimate or opinion of his personal strength?"

III.

The Court erred in overruling defendant's objection to the question asked the witness Babcock:

"Q. Did he inspect the seventh bullet hole, concerning which you have testified, through the gunnysack?"

IV.

And also the question asked the same witness: "Were you acquainted with Bury?"

V.

The Court erred in overruling defendant's motion to strike out the evidence of the witness, Babcock, in relation to the hole in the gunnysack having the appearance of a bullet hole.

VI.

The Court erred in sustaining plaintiff's objection to the question asked the witness, Thomas Rhodes, as follows: "Did you hear George Rupert at the time that one of those pistols was picked up state that it was the pistol of Louis B. McWhirter?"

VII.

The Court erred in sustaining plaintiff's objection to the question asked the witness, Mrs. J. A. Lane: "What, if anything, did she say to you about his being affectionate, particularly on that day?"

VIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Mrs. W. D.

Crichton: "What, if anything, did she tell you at that time and place in relation to what she had seen?"

IX.

The Court erred in sustaining plaintiff's objections to the following question asked the witness, H. H. Welch: "Please state to the jury what it was she stated she saw at the time and in the same presence?"

X.

The Court erred in sustaining plaintiff's objection to the following question asked the same witness: "Did she at the time and at the place mentioned and in the presence of the persons stated, tell you that she had looked out of the window and at the last shot had seen Mr. McWhirter fall?"

XI.

The Court erred in sustaining plaintiff's objection to the following question asked the same witness: "Did she at that time, and in the presence of the sheriff of the county and Thomas Bury and Mrs. McWhirter, state to you that she had looked out of the window and that she saw something white fall, and heard nobody run away and no noises?"

XII.

The Court erred in overruling defendant's objection to the following question asked the witness, Thomas Bury: "You were in constant consultation with the attorneys for the defendant?" (referring to the Heath case during the trial.)

XIII.

The Court erred in overruling defendant's objection to the following question asked the witness G. H. Bernard: "What was said—by whom and to whom?"

XIV.

And in overruling the defendant's objection to the following question asked the same witness: "What, if anything, did Phillip Scott at that time and place say about sawdust?"

XV.

The Court erred in sustaining plaintiff's objection to the following documents procured by the witness Seaver:

"San Francisco, September 1st, 1892.

"To Colt's Patent Firearms Company, Hartford, Conn.

"When and to whom did you invoice forty-one double-action revolver No. 88,031. Answer by telegram immediately.

"Colt's Patent Firearms Company."

"Hartford, Conn.

"To Colt's Arms Co., San Francisco, Cal.

"88,030 sent you May 5th, 1892.

"Colt Arms Co."

XVI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness W. A. Seaver: "Can you state to this jury whether or not, in the month of May, at any time, you received an invoice of pistols similar in kind and character to that which you now hold in your hand, and if so, how many?"

XVII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, W. A. Seaver: "Now, then, I will ask you whether or not on the 7th day of June, if you can tell, you sold and delivered a pistol exactly similar in kind and character to the firm of Clabrough, Golcher & Co., in the City and County of San Francisco, who have their present business in the Grand Hotel Building, between Montgomery and Second streets—that is, within 500 feet of the Palace Hotel?"

XVIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, E. F. Bernard: "Did you have any conversation with Mr. McWhirter in returning from that banquet in relation to suicide, or anything of that kind?"

XIX.

The Court erred in refusing to permit the following question asked by counsel for defendant, to be answered by the witness, D. L. Davis: "I will ask you whether or not in that saw at that time there was a tooth that fitted into the cuts or curves of this osage orange?"

XX.

The Court erred in not permitting the counsel for defendant to ask the following question to the same witness: "Whether or not at the time when you were called in by District-Attorney of the county he made an examination of the saw and fitted the teeth into these cuts or curves of this osage orange where it had been sawed?"

XXI.

The Court erred in refusing to allow defendant to prove by the witness, D. L. Davis, the manner in which he fitted it and the result.

XXII.

The Court erred in sustaining defendant's objections to defendant's offer to prove by the witness Golcher, of the firm of Clabrough, Golcher & Co., that the pistol was received by them on the 7th of June from the agent of the Colt's factory, and sold on that day.

XXIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, E. F. Bernhard: "I will ask you whether or not in the spring of 1889, you had a conversation with the deceased, L. B. McWhirter, in relation to suicide, and if so, what that conversation was?"

XXIV.

The Court erred in excluding the following testimony of the witness E. F. Bernhard:

"Mr. Campbell—Q. Can you now fix the date of your conversation with Mr. McWhirter, as near as possible?

"A. I think it was in the spring of 1889.

"Q. The spring of 1889? A. I think so.

"Q. Now, will you please state, what, if anything, Mr. McWhirter said to you in relation to suicide, or in relation—under what circumstances he would commit suicide?

"A. The exact conversation I could not state at this time, but to the best of my recollection it was this, that if he ever did anything that would disgrace himself or his family, that he would kill himself, or that he would kill himself if he ever did anything that would bring disgrace upon him or his family.

"Q. Is that the substance of the testimony?

"A. That is the substance.

"Q. Where had you been that evening, if you remember?

"A. We had been to a little entertainment at Mr. Grady's residence.

"Q. You were coming home together, were you.

"A. We were coming together. We left together —we walked from Mr. Grady's residence to this point.

"Q. That was the substance of what he told you.

"A. Yes, sir.

"The Court—You might state in what connection this conversation arose.

"A. We were discussing, to the best of my recollection, some of the history, you might term it, of another person, and in that connection this conversation arose out of that.

"The Court—That is all, I think the ruling is correct.

"Mr. Campbell—I was going to make the following offer—to re-offer this testimony in connection with the testimony that was offered this morning, of Mr. Chapman with the record."

"Objection sustained and defendant excepts."

XXV.

The Court erred in refusing to allow defendant to re-offer the testimony of E. F. Bernhard in connection with the testimony of the witness Chapman and the record.

XXVI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Richard S. Heath: "State to the jury whether or not you killed Louis B. McWhirter."

XXVII.

The Court erred in refusing to allow counsel for defendant to ask the same question of Judge Harris, Superior Judge of Fresno County.

XXVIII.

The Court erred in refusing to allow counsel for defendant to ask the same question of Reel B. Terry.

XXIX.

The Court erred in refusing to allow counsel for defendant to ask the same question of Mr. Gray, the attorney.

XXX.

The Court erred in refusing to allow counsel for defendant to ask the same question of Senator Goucher.

XXXI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Richard S. Heath: "Is your trial still pending?"

XXXII.

The Court erred in granting plaintiff's motion to strike out the following answer of the witness, O. N. Chaffee: "Mrs. McWhirter, I think, on the 18th of October, the same day stated that they had detectives out at work, trying to find out who murdered Mr. McWhirter; that they had facts in their possession; that they had traced out a great many reports which had been made alleging that this was a suicide, and that in every case they had traced them home to parties who were raising the suicide theory?"

XXXIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, O. M. Chaffee: "Did Mrs. McWhirter at that time say anything to you about having received a letter of instructions or received instructions from her husband as to what to do in case of his death?"

XXXIV.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "I wanted to ask her whether anything was said between herself and her husband?"

XXXV.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "How often, Mrs. McWhirter, did you and Mr. McWhirter discuss and talk over the subject of training and education of your child?"

XXXVI.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "About how often?"

XXXVIII.

The Court erred in overruling defendant's motion to strike out the following answer of the witness, John S. Eastwood: "It seems to me I heard a groaning sound."

XXXIX.

The Court erred in denying defendant's motion to strike out the following answer of the witness, W. L. Raims: "It is my opinion that the first two shots could not have been fired out of the same pistol."

XL.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Hume: "Do you know on what Mr. Thacker's opinion as to the suicide is based?"

XLI.

The Court erred in overruling defendant's objection to the following question asked the witness, J. E. Baker: "What was his general conduct and exhibition of sentiment towards his child?"

XLII.

The Court erred in overruling defendant's objection to the following question asked the witness, Dr. E. G. Deardorff: "Did he not so inform you?"

XLIII.

The Court erred in sustaining the plaintiff's objection to the following question asked the witness, Dr. Deardorff: "Did you not testify upon that coroner's inquest that you examined Mr. McWhirter upon March 18th for the New York Life Insurance Company, and on March 23d for the Providence Life Insurance Company, and he stated to you at that time: 'I have a good many political enemies, and I expect really that my life will be attempted, or that I will be killed before the campaign closes.'"

XLIV.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, J. E. Baker: "Did he not tell you that he was apprehensive of being assassinated, and for that reason he carried $60,000 in life insurance?"

XLV.

The Court erred in overruling defendant's objection to the following question asked the witness, Dr. E. C. Webb: "In the first instance in which the clothing was set on fire, what was the nature of the garment, and under what circumstances was the—"

XLVI.

The Court erred in overruling defendant's objection to the following question asked the witness, Dr. E. C. Webb: "What was the nature of the weapon in the cases you have observed?"

XLVII.

The Court erred in overruling defendant's objection to the following question asked the witness, W. J. Tinnin: "Was there anything unusual or different from the ordinary or usual talk of Mr. Louis B. McWhirter on the 28th of August?"

XLVIII.

The Court erred in sustaining plaintiff's objection to the question asked the witness, W. J. Tinnin: "He had told you that before that time, had he not?"

XLXIX.

The Court erred in overruling defendant's objection to the following question asked the witness, Lee Blasingame: "When and from what person was the first time you ever knew or heard of sawing by any person of that branch or bough of osage orange, in the vacant lot adjoining Mrs. Southwood's house."

L.

The Court erred in overruling defendant's objection to the following question asked the witness, John L. Meares: "Did you see any affray or assault between McWhirter and Carroll?"

LI.

The Court erred in overruling defendant's objection to the answer of the witness: "I turned to McWhirter and asked him if he had a pistol."

LII.

The Court erred in charging the jury in relation to the sufficiency of the evidence to sustain the defense

of suicide, and the defendant specifies the particular portions of the charge so erroneous, as follows:

"If you find from the evidence that any other person than Louis B. McWhirter was present and participating in the shooting, or was present and participating in any way in the transaction, or if you find that more than six shots were fired upon that occasion, at that time and place, then in either such case I instruct you that the evidence is insufficient to support the defense of suicide.

"You are further instructed that the entire theory of the defense in this case is based upon the assumption that Louis B. McWhirter prepared the clubs and the mask found upon his premises shortly after the killing; that six, and only six shots, were fired on that occasion; that five, and only five, were fired into the fence and outhouses upon the premises, and that McWhirter fired the sixth into his own body and through his own heart, which caused his death. This theory of the defense is founded upon the allegation that McWhirter prepared the surroundings to indicate a sham assassination or scene of murder and then killed himself. If you should find that Louis B. McWhirter did not make such preparations, that he did not saw the club found upon his premises, that he did not prepare the mask, that he did not own or possess both pistols, and that he did not fire all the shots, the bullet holes of which are found in the fences and outhouses and on his own body, your verdict should be for the plaintiff."

LIII.

The Court erred in charging the jury in relation to the defense of fraudulent concealment, and the

defendant specifies the particular portion of the charge so erroneous, as follows:

"I meant to tell you, gentlemen, that these threats must have existed prior to the time of entering into the contract of insurance. You are to find whether or not they did, from what he said afterwards. That is the only light you have on the subject. It does not necessarily follow that because he said he had taken out the amount of insurance that he had, or was carrying so large amount on account of threats of personal violence, that those threats had existed when this particular policy was taken out. He might have heard threats after those policies were taken out, and increased his amount of insurance on account of threats. You are to take all he said on that subject into consideration, and find whether or not his statement in regard to the threats, and the reason for taking the policies, applied to this policy as well as the others. You will take the instruction in connection with the other instructions which I give you on the same subject."

LIV.

The Court erred in charging the jury in relation to the amount of the verdict, and the defendant specifies the particular portions of the charge so erroneous as follows:

"Gentlemen, endeavor to harmonize your views on this subject, and render a verdict. There are only two verdicts that you can render. You may render a verdict for the plaintiff for the full amount sued for; you cannot render a verdict for less than the amount sued for, unless you render a verdict for the

defendant. If you render a verdict for the defendant, I suggest that you state on which of the two defenses you find it, if you do find for the defendant."

LV.

The Court erred in refusing to give the instruction numbered "O" requested by the defendant, which instruction is as follows:

"Gentlemen of the Jury, the issues made by the pleadings in this case are as follows:

1. Did Louis B. McWhirter on the 28th day of August, 1892, commit suicide, or die by his own hand?

2. Was Louis B. McWhirter on said date assassinated?

3. Was there a breach of warranty of the contract of insurance entered into between said Louis B. McWhirter and the defendant, the Connecticut Mutual Life Insurance Company?

4. Was Louis B. McWhirter guilty of fraud in concealing certain material facts from said insurance company which were material to said contract, that is, which would have increased the hazard of said insurance or the premium to be paid by said Louis B. McWhirter."

LVI.

The Court erred in refusing to give the instruction number IX, requested by the defendant, which instruction is as follows:

"In instructing you that a witness false in one part of his testimony is to be distrusted in others, I call your attention to the testimony of Lee

Blasingame, the witness produced on behalf of the plaintiff. If you believe from the evidence that the said Lee Blasingame has testified in any particular to anything which is wilfully false, then I instruct you that the remaining part of his evidence is to be received with distrust."

LVII.

The Court erred in refusing to give the instruction numbered X, requested by the defendant, which instruction is as follows:

"A great deal has been said during the trial and in the argument of counsel in relation to a certain letter which the plaintiff admits having been given her after the death of her husband, and which was written to her by her husband concerning her action after his death. It is for you, gentlemen, in view of all of the circumstances surrounding the case, to determine whether or not it was the duty of the plaintiff to have divulged the contents of that letter.

"If you believe from the evidence that said letter contained evidence that the deceased, Louis B. McWhirter, committed suicide, and that said evidence was in the possession of the said plaintiff, then I instruct you that it was her duty to have made said facts known to the defendant insurance company upon an application being made to her for such information, if you believe any such application was so made, and if you believe from the evidence that she did receive such a letter, and that she neither produced said letter nor testified to its contents when upon the stand, then you are to presume, for the purposes of this

case, that if such letter was produced, it would be evidence against the plaintiff in said cause, for the law presumes that evidence wilfully suppressed would be adverse if it were produced, and that higher evidence would be adverse from inferior being produced, and I instruct you that the letter itself would be the best evidence of its contents."

LVIII.

The Court erred in refusing to give the instruction numbered XI, requested by the defendant, which instruction is as follows:

" In the applications which have been introduced in evidence, the following questions were asked of the deceased, and the following answers given by the deceased:

" Is there any *fact* relating to your physical condition, *personal* or family history or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?" The answer to that question was 'No.' "

And furthermore, it was by the terms of said policies and applications agreed that the questions and answers were a warranty, and that each and every answer to each and every question was true.

If you believe from the evidence in this case that at the time of the application for insurance made by said Louis B. McWhirter, and at the time of the delivery of the policies of insurance which are the subject matter of this controversy, said Louis B. McWhirter had been threatened or was apprehensive of being

assassinated, then I instruct you that such facts were a part of the personal history of said Louis B. McWhirter, and should have been communicated to the defendant insurance company, and the failure to so communicate them avoids the policy, and you should find a verdict for the defendant."

LXIX.

The Court erred in refusing to give the instruction numbered XII, requested by the defendant, which instruction is as follows:

"The question and answer referred to in the instruction numbered IX were a warranty upon the part of the said Louis B. McWhirter that there was no fact in his personal history that would increase the hazard or increase the premium of said insurance, and you are instructed that the only question for you to determine is as to whether or not said warranty was true. It makes no difference whether said representation was material or not, if you find from the evidence that the same was untrue, then it is your duty to find a verdict for the defendant."

LX.

The Court erred in refusing to give the instruction numbered XIII, requested by the defendant, which instruction is as follows:

"Warranties are a part of the contract of insurance upon which the insurer as well as the insured has a right to rely, and if you find from the evidence that the deceased, Louis B. McWhirter, in answer to the question asked him as to whether or not there was any fact in his personal history which said company

ought to know, said "No," then I instruct you that if it were a fact, and if you so find from the evidence, that prior to the time of said application and said answer, the said Louis B. McWhirter had had difficulties with certain persons who threatened his life, and that he was then apprehensive of assasination, that was such a fact as he should have communicated to said company, and his failure to communicate such fact to the said company was a breach of the warranty contained in said application, and you should find a verdict for the defendant."

LXI.

The Court erred in refusing to give the instruction, numbered XIV, requested by the defendant, which instruction is as follows:

"If you find from the evidence that the deceased, Louis B. McWhirter, prior to the application for insurance in these cases, to-wit: December ...., 1891, and March ...., 1892, had had difficulties, political and personal, and his life had been threatened, and that he was then apprehensive of being assassinated, and that he concealed said fact in said application from said defendant insurance company, then I instruct you that said Louis B. McWhirter was guilty of fraud in concealing said facts from said company, and it is your duty to find a verdict for the defendant."

LXII.

The Court erred in refusing to give the instruction, numbered XV, requested by the defendant, which instruction is as follows:

"A neglect to communicate that which a party knows and ought to communicate is called a concealment. A concealment, whether intentional or unintentional, vitiates the policy, and if you find from the evidence in this case that Louis B. McWhirter's life had been threatened, and that at the time of the application for said insurance or the deliverance of the policies of insurance, he concealed said fact from the defendant insurance company, then it is your duty to find a verdict for the defendant."

LXIII.

The Court erred in refusing to give the instruction, numbered XVI, requested by the defendant, which instruction is as follows:

"The materiality of the concealment is to be determined not by the event, but by the probable and reasonable influence upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries, and if you believe from the evidence in this case that the concealment, if you find that there was any, practiced by the said Louis B. McWhirter, in obtaining the insurance from the defendant would have had any influence upon the defendant in issuing to him its policies, then I instruct you it is your duty to find a verdict for the defendant."

LXIV.

That the judgment is against law.

LXV.

That the judgment is contrary to the evidence.

LXVI.

That the judgment is not supported by the evidence, in this, that all of the evidence given upon the subject, without any contradiction whatever, shows that the deceased, Louis B. McWhirter, at the time of making application for the insurance—the subject matter of this action—had been threatened with assassination, and expected to be killed or assassinated, and that he concealed said facts from the defendant here; and that said concealment thereby became and was a breach of the warranty in the application for insurance made and signed by said Louis B. McWhirter, and was and is a fraudulent concealment under and by virtue of the statute of California.

LXVII.

That the Court erred in overruling the demurrer to the plaintiff's complaint interposed by the Connecticut Mutual Life Insurance Company, defendant.

LXVIII.

That the Court erred in overruling the demurrer interposed by the Connecticut Mutual Life Insurance Company, defendant, to the first count of plaintiff's complaint.

LXIX.

That the Court erred in overruling the demurrer interposed by the Connecticut Mutual Life Insurance Company, defendant, to the second count of the plaintiff's complaint.

LXX.

That the Court erred in entering judgment in favor of the plaintiff against the defendant.

And the defendant, the Connecticut Mutual Life Insurance Company, prays that said judgment be reversed, annulled and altogether for naught held, and that it may be restored to all things which it has lost by occasion of said judgment.

JAMES H. BUDD and J. C. CAMPBELL,
Attorneys for Defendant, Connecticut Mutual Life Insurance Company.

[Endorsed]: Filed August 7, 1894. J. W. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

Nannie S. McWhirter,
Plaintiff,
vs.
Connecticut Mutual Life Insurance Company,
Defendant.

At Law. Order for Writ of Error.

This seventh day of August, 1894, came the defendant by its attorneys, James H. Budd and J. C. Campbell, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error, intended to be urged by said defendant. On consideration whereof, it is ordered that a Writ of Error to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment hereinbefore, on the 9th day of February, 1894, filed and entered herein against defendant, and in favor of plaintiff, be and the same is hereby allowed, and that a certified transcript of the record be forthwith transmitted to said

United States Circuit Court of Appeals, for the Ninth Circuit, upon a bond being given and approved by the undersigned Judge, or in his absence by the Clerk of said Court, conditioned in the sum of five hundred dollars, that the said Connecticut Mutual Life Insurance Company, defendant, shall prosecute its writ to effect, and if it fails to make its plea good, shall answer all costs; and

It is further ordered, that execution of said judgment shall be stayed upon said Connecticut Mutual Life Insurance Company giving a supersedeas bond, conditioned in the sum of thirty-three thousand dollars.

Dated San Francisco, California, August 7th, 1894.

JOSEPH McKENNA,
Circuit Judge.

[Endorsed]: Filed August 7, 1894. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Northern District of California.

NANNIE S. McWHIRTER,
Plaintiff,
vs.
CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.

Stipulation.

It is hereby stipulated that the defendant in the above-entitled action need not give a supersedeas bond

to stay the execution of the judgment therein, from which it is prosecuting a writ of error, until the motion for a new trial is heard and determined.

THORNTON & MERZBACH,
Attorneys for Plaintiff.

[Endorsed]: Filed August 9th, 1894. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

NANNIE S. McWHIRTER,
Plaintiff,
vs.
CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, the Connecticut Mutual Life Insurance Company, as principal, and F. R. Noyes of the County of Alameda, and C. B. Parcells of the County of Alameda, as sureties, are held and firmly bound unto the above named Nannie S. McWhirter in the sum of five hundred dollars, to be paid to the said Nannie S. McWhirter, her executors, administrators or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of August, 1894.

WHEREAS, The above-named Connecticut Mutual Life Insurance Company has prosecuted a Writ of Error to correct a judgment rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Northern District of California.

NOW, THEREFORE, The condition of this obligation is such that if the above-named Connecticut Mutual Life Insurance Company shall prosecute said Writ of Error to effect, if it fails to make its plea good shall answer all costs, then this obligation to be void, otherwise to remain in full force and virtue.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

By F. R. NOYES, Genl. Agent. (Seal)

F. R. NOYES. (Seal)

C. B. PARCELLS. (Seal)

Sealed and delivered and taken and acknowledged before me this 8th day of August, 1894.

W. J. COSTIGAN,

Commissioner and Clerk U. S. Circuit Court, Northern District of California.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA. } ss.

C. B. Parcells and J. R. Noyes, the sureties whose names are subscribed to the foregoing bond, being severally duly sworn, each for himself, says, I am a resident of the Northern District of California, and am a   holder therein, and am worth the sum in foregoing bond specified as the penalty thereof over

and above all my just debts and liabilities, exclusive of property exempt from execution.

C. B. PARCELLS.
F. R. NOYES.

Subscribed and sworn to before me this 8th day of August, 1894.

W. J. COSTIGAN,
Commissioner and Clerk U. S. Circuit Court,
Northern District of California.

The foregoing bond approved this 9th day of August, 1894.

JOSEPH McKENNA.

The foregoing is satisfactory bond.

THORNTON & MERZBACH,
Attorneys for Plaintiff.

[Endorsed]: Filed August 9th, 1894. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

NANNIE S. McWHIRTER,
Plaintiff,
vs.
CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Defendant.

Certificate of Transcript.

I, W. J. Costigan, Clerk of the Circuit Court of the United States of America, Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing (349) written pages, numbered from 1 to 349 inclusive, to be a full, true and correct

copy of the record, papers and proceedings in the above and therein entitled cause, and that the same constitute the return to the annexed Writ of Error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 31st day of August, A. D. 1894.

W. J. COSTIGAN,
Clerk of the U. S. Circuit Court, Northern District of California.

THE UNITED STATES OF AMERICA.—SS.

The President of the United States of America, to the Judge of the Circuit Court of the United States, for the Northern District of California—Greeting:

Because in the records and proceeding, as also in the rendition of the judgment of a plea which is in said Circuit Court before the Honorable WM. B. GILBERT, Circuit Judge, between Nannie S. McWhirter, plaintiff and defendant in error, and Connecticut Mutual Life Insurance Company, defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and the proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco on the fifth day of September, 1894, in said Circuit

Court of Appeals, to be then and there held; that the record and proceedings being then and there inspected, the said Circuit Court of Appeals may cause further to be done herein to correct that error which of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable MELVILLE W. FULLER, Chief Justice of the United States Supreme Court, this 9th day of August, in the year of our Lord one thousand eight hundred and ninety-four.

(Seal) W. J. COSTIGAN,

Clerk of the Circuit Court of the United States,

Northern District of California.

Service of the within writ of error and receipt of a copy thereof admitted this 9 day of August, 1894.

THORNTON & MERZBACH,

Attorney for Plaintiff and Defendant in Error.

The answer of the Judge of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

W. J. COSTIGAN,

Clerk.

[Endorsed]: No. 11,702. United States Circuit Court of Appeals, Ninth Circuit. Connecticut Mutual Life Insurance Company, plaintiff in error, vs. Nannie S. McWhirter, defendant in error. Writ of Error. Filed August 9th, 1894.

W. J. COSTIGAN,
Clerk.

UNITED STATES OF AMERICA.—SS.

The President of the United States to Nannie S. McWhirter—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the fifth day of September next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Northern District of California, wherein Connecticut Mutual Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable J. McKENNA, Judge of the United States Circuit Court for the Ninth Judicial Circuit, this ninth day of August, one thousand eight hundred and ninety-four.

JOSEPH McKENNA,
Judge.

I hereby acknowledge personal service made on me of the above citation this 9th day of August, 1894.

THORNTON & MERZBACH,
Attorneys for Plaintiff.

[Endorsed]: No. 11,752. United States Circuit Court of Appeals, Ninth Circuit. Connecticut Mutual Life Insurance Company, plaintiff in error, vs. Nannie S. McWhirter, defendant in error. Citation on Writ of Error. Filed August 9th, 1894.

W. J. COSTIGAN, Clerk.

[Endorsed]: Filed Sept. 4th, 1894.

F. D. MONCKTON,
Clerk.

No. 195

IN THE

United States Circuit Court of Appeals,

For the Ninth Circuit.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

NANNIE S. McWHIRTER.
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

JAS. H. BUDD,
J. C. CAMPBELL,
Attorneys for Plaintiff in Error.

Filed this 4th day of February, 1895.

Clerk.

J. M. TORRES, PRINTER, 320 SANSOME ST.

IN THE

United States Circuit Court

OF APPEALS,

FOR THE

NINTH CIRCUIT.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

NANNIE S. McWHIRTER.
Defendant in Error.

Statement of the Case.

This action is prosecuted on a writ of error from the Circuit Court of the Ninth Circuit in and for the Northern District of California, and was brought by Nannie S. McWhirter, the plaintiff in the Court below, to recover the sum of fifteen thousand dollars ($15,000.00) and interest alleged to be due upon two certain policies of insurance issued by plaintiff in error upon the life of Louis B. McWhirter, her husband, and payable to her as the beneficiary therein

named, one of said policies being dated December, 19th A. D. 1891, and being for the sum of five thousand dollars ($5,000.00) and the other being dated March 15th, A. D. 1892, and being for the sum of ten thousand dollars ($10,000.00).

The complaint is in two counts and is substantially as follows:

It alleges that, the plaintiff in error is a Corporation, organized under the laws of the State of Connecticut for the purpose of conducting and carrying on the business of life insurance, and that at the times in the complaint named it was carrying on business in the State of California.

It alleges that, the plaintiff in the Court below and Louis B. McWhirter were, up to the 29th day of August, A. D. 1892, husband and wife.

It alleges that, on the 19th day of December, A. D. 1891, that the defendant for a valuable consideration issued its certain policy of insurance, and then proceeds to set forth some of the terms and conditions of said policy (see Tr. pp. 2–3–4), one of said conditions being that said Insurance Company should not be held liable thereon, if the death of the insured was caused by self destruction. (Tr. p. 4.)

Then said complaint further alleges:

"And the plaintiff further alleges, that each and all "of the several answers, warranties and agreements "*contained in the application for insurance which was and* "*is the basis of and a part of the said policy*, *were* and

"*are true* in the *letter* and the *spirit* thereof, and the "said warranties and agreements have been performed "and made good." (Tr. p. 5.) (Italics are ours).

That all of the premiums due under the said policy have been paid; and said complaint further alleges:

"That the said Louis B. McWhirter did not die "from any cause in the said policy named, but that "he did die on the 29th day of August, A. D. 1892, at "the city of Fresno, county of Fresno, and State of "California, *by being murdered and assassinated by* "*certain persons to the plaintiff unknown.*"

That no assignment of said policy had been made.

That due notice and satisfactory evidence of the death of said assured, Louis B. McWhirter, was delivered to and received by defendant, at its office in Hartford, Connecticut, prior to the first day of December, A. D. 1892.

That no part of said five thousand dollars ($5000.) had been paid, etc.

The second count is substantially the same in form as the first, except the date of the policy, and the amount of the same.

To said complaint the plaintiff in error filed a demurrer, which appears on pages 18–19–20–21 and 22 of the Transcript, which demurrer was by the Court overruled, and which ruling is assigned as one of the errors upon this writ, and to which we will call the Court's attention later on in this brief.

Said demurrer being overruled, the defendant then filed its answer, which answer appears on pages 24

to 71 of the Transcript, and *denies* that the warranties in the complaint set forth and contained in the applications for said insurance were true, or that the agreements or warranties had been kept and performed or made good; *denies* that said Mc Whirter did not die from any cause in said policy named as an excepted risk on the life of said Mc Whirter; *denies* that said Mc Whirter was murdered or assasinated by any one whomsoever, and alleges that said McWhirter died by self destruction, that is to say, that at the time and place in complaint mentioned said Louis B. Mc Whirter committed suicide, and that at said time said Mc Whirter was not insane, etc. (Tr. pp. 24–25.)

Said answer then sets forth in full, the provision of said policy in regard to suicide, and alleges affirmatively that said Louis B. Mc Whirter violated said provision by committing suicide, or that he died by his own hand, etc. (Tr. pp. 25–26–27.)

The third count in said answer alleges a breach of warranty on the part of said Louis B. Mc Whirter and Nannie S. Mc Whirter in this, that said Louis B. Mc Whirter had given a false and fraudulent answer to one of the questions contained in the application for insurance, and sets forth said application in full. (Tr. pp. 28 to 35.)

The particular question to which said Court is directed is as follows:

"No. 11. Is there *any fact* relating to your physical "condition, *personal* or family history, or habits which

"has not been stated in the answers to the foregoing "questions, *and with which the Company ought to be made "acquainted?* Answer, *No.*" (Italics are ours.)

The warranty, which was signed by both, the assured and the beneficiary, was as follows:

It is hereby declared and warranted that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this application and the several answers, warranties and agreements herein contained shall be the basis of, a part of the consideration for, and a part of the contract of insurance, and that no statement or declaration made to any agent, solicitor, canvasser, examiner, or any other person, and not contained in this application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and that if there be, in any of the answers herein made, any fraud, untruth, evasion, or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said policy for its continuance as paid-up insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties

hereto under any law of any State relating to the lapse or forfeiture of policies of life insurance.

Dated at Fresno this 19th day of November, 1891.

Signature of the person or persons for whose benefit the insurance is to be effected. (Write the names in full.)

NANNIE S. MCWHIRTER,
By LOUIS B. MCWHIRTER.

Signature of the person whose life is proposed for insurance. (Write the name in full.)

Witness the signing hereof,

LOUIS BRANSFORD MCWHIRTER.

J. B. HAYS.

The answer further alleges, that said Louis B. McWhirter fraudulently and intentionally omitted to communicate to said Company, in said application, facts which were material to said contract of insurance; which if the same had been communicated to said defendant, said defendant would not have issued said policy of insurance upon the life of McWhirter.

Said facts appear on page 36 of the Transcript, and are in substance, that at and prior to the time of making his application for insurance to said defendant, that said Louis B. McWhirter had had many difficulties with various persons who had threatened to kill him, said McWhirter, and that at the time of making said applications and accepting said policy of insurance said McWhirter was in fear of being killed by reason of said threats, and was in danger of being murdered, etc., and that it was by reason of such fears

and of such threats that he made said applications. (See Tr. pp. 36-37).

The next count in the answer alleges that said concealment of said facts was a fraud upon said Insurance Company which vitiated the policy. (See Tr. pp. 45-47).

The answer to the second count of said complaint is substantially the same as to the first, simply changing the same as to date and amount of policy. Hence in substance the answer raised the following issues:

1st. It denied the allegation of murder or assassination.

2nd. It denied the allegation that the assured had not died by his own hand.

3rd. It alleged a breach of warranty in the answer in the application; and

4th. It alleged fraudulent concealment of material facts in said application.

The facts out of which this controversy grew are as follows:

On the morning of the 28th of August, A. D., 1892, between the hours of one and two o'clock, Louis B. McWhirter, the assured, arose from his bed after he had ostensibly retired for the night, awakened his wife, and informed her that he thought he heard some one walking in his yard, asked her if she did not hear them. Upon being informed by her that she did not, and anything he might have heard was probably

their little dog; then informed her that some water melon he had eaten did not agree with him, or something to the same effect, put on his shoes and his trousers, and taking a revolver in his hand, started out by his front door into his front yard. As he went out the front door he rang the door bell, and called back to his wife that he had rung it by accident; he then went towards his back yard, towards his water closet. As he passed his bed-room window he had some conversation with his wife when, in answer to her question, he again repeated that he had rung the bell by an accident. In a short time after this conversation a number of pistol shots were fired in the back part of his yard. (The number we will treat of hereafter). His wife ran out and found him lying in the yard unconscious with a pistol shot through his lung and heart. He never thereafter became conscious and died within an hour.

Louis B. McWhirter had either been foully murdered or he had died by his own hand.

Subsequent investigation developed the following facts as shown by the evidence in this Transcript.

He was thirty-eight years old.

He had never been successful either in his profession or in his business.

Prior to his marriage he had been compelled to draw upon his father and his mother for money to meet his living expenses. (Tr. p. 114.)

He had been compelled to borrow money from his friends to get married upon. (Tr. p. 114.)

He married a young lady of wealth and gradually dissipated her fortune to such an extent that shortly prior to his death, after having either sold or mortgaged all the rest of her property, she was compelled to and did mortgage her homestead. (Tr. pp. 108–109–110–111.)

He was a man of no credit. (Tr. pp. 113–115).

He had been arrested upon a criminal charge. That of attempting to extort money. (Tr. pp. 228-229.)

He was greatly worried over being charged with the crime. (Tr. p. 230)

He had been notified by the bank that certain monies secured by mortgage were long overdue, and if not paid foreclosure proceedings would be commenced (Tr. p. 112).

He had been notified that his insurance premiums were at his bank for collection (Tr. p. 113.)

The foregoing were some of the facts showing the mental and financial condition of Louis B. McWhirter, the assured, at and prior to his death.

A further investigation of the facts show. That in the month of December, A. D. 1891, the assured, Louis B. McWhirter, commenced taking insurance upon his life, and between the 19th day of December, A. D. 1891, and the 1st day of June, A. D. 1892, a period of six months, he did obtain life insurance policies on his life from this plaintiff in error and other companies to the amount of sixty thousand dollars, to wit, forty-five thousand dollars in other companies and fifteen thousand in the company of plaintiff in error,

and *all* of *said insurance except the 1st policy in plaintiff's Company for $5000, was obtained between the the 1st of March and the 1st of June making $55,000 insurance obtained in three months.* (Tr. pp. 107–108.)

In the month of May, A. D. 1892, he endeavored to obtain from the witness Valentine, insurance to the amount of $20,000, going to said Valentine to make his own application, not being solicited therefor (Tr. p. 115).

He informed the witness Bates that he had insurance to the amount of $60,000 and was trying to get $40,000 more. (Tr. p. 232.)

Hence here was a man without money, without credit, without business, and without any income whatever and indebted and unable to pay; a man who had been in a measure at least supported by his parents prior to his marriage, and who had gradually but surely eaten up the patrimony of his wife since his marriage. Carrying $60,000 insurance, and endeavoring to put himself in a position of carrying $100,000. Part at least of the premiums were not paid at the time of his death (Tr. p. 113), and part at least, he endeavored to obtain on his own personal credit by giving his own promissory note therefor, refusing to have his wife the beneficiary, sign or endorse them, or either of them (Tr. p. 115–116), and being greatly displeased when such a matter was suggested.

He then commenced to talk to his friends of his life being in danger and of his having been threatened,

but while he communicated to his friends and acquaintences that he had been threatened he failed to state by whom he had been so threatened or from whom he was apprehensive of danger. And strange as it may seem, that although they allege in their complaint that he was murdered, *not a single witness was produced at the trial who ever heard any person* threaten him with bodily injury of any kind or character.

Louis B. McWhirter expected to die, and commenced making his preparations.

He first obtained his life insurance.

He second commenced to prepare his wife and his relations for the event.

He spoke to his wife about being killed (Tr. p. 150).

He spoke to his brother-in-law, Lee Blassingame, asking him if anything happened to him to take care of his boy. (Tr. p. 175.)

He spoke to J. H. Lane about being killed. Said he expected *to be killed.* (Tr. p. 150.)

To Thomas H. Bates. (Tr. p. 232).

To all of these he said in substance that he expected to be killed, but did not inform them by whom or how.

On the day before his death he called his wife to him and told her, how he wanted her to change their house, when he was gone.

He twice on that day told her how he desired their son to be raised and educated; how he wanted her to send for and have him come and live with her, *when he was gone.* He went into all the minute details.

Verily he set his house in order, preparing for his departure. (Tr. pp. 151–155.)

He spoke as he had never spoken before (Tr. p. 156). His conversation was such that his wife *knew that something was going to happen to him that night* (Tr. pp. 156–157.)

And last, but not least of his preparations, was the letter to his wife, dated June 25, A. D. 1892 (Tr. pp. 122-123, 154-155), telling her what he wanted done after he was gone; telling her he knew its *words* would kill her, but she must bear up and live for the child's sake, etc.

All of this had he done prior to the morning of August 29th, A. D. 1892.

We have hereinbefore stated what he did after retiring for the night; how he got up; spoke of the noise; spoke of being indisposed; put on his shoes and trousers; took his revolver; went out his front door, rang the bell; spoke twice to his wife; went to the back part of his yard. Shots were fired, and his wife ran out and found him lying in the yard, unconscious, with a bullet hole into his heart. His outer shirt and under shirt *powder burned* (Tr. p. 117). No bruises upon his body; no discolorations or abrasions of his skin.

The premises in which McWhirter lived fronted upon one of the public streets of Fresno. Through the alley rnnning parallel with the same street was an alley, the yard ran back to this alley, and along the back part of the yard, along the alley, was a board fence *four feet high.* In one corner of the back yard was his water closet, and in the other was his chicken house. There was a gate in the back fence about the

middle of the yard. By the side of where McWhirter lay in the yard, and close by his right hand, was picked up a revolver containing six chambers, which was admitted to be his. Three of the chambers had been discharged; the other three were found loaded with cartridges—41 calibre short. Some twelve or fifteen feet from where he lay was found another revolver containing six chambers three of which had been discharged, and the remaining three were found to contain cartridges—*41 calibre short.*

The bullet taken from the body of McWhirter *was a 41 calibre short.* An investigation of the water closet and the fence surrounding McWhirter's yard, showed that five shots had been fired, two through the water closet and three through the fence. *All of these bullets had gone from the inside of the yard outwards.*

Near where the second revolver was found, and against the fence were found two osage orange clubs about two feet long, with a piece of cotton clothes line tied around each in a loop, ostensibly to attach them to the wrist. The ropes were so poorly tied on that they dropped off immediately upon being picked up. The cotton clothes line had been freshly cut, and was identical with the clothes line in the back yard of McWhirter, which had also been freshly cut, and upon being compared fitted exactly as to length, size and the cuts. The osage orange clubs had been poorly sawed with a saw that had defective teeth. In the vacant lot adjacent to McWhirter's residence was some osage orange trees that had been dug up some

six months before. In McWhirter's chicken house it was found where some sawing had recently been done *and the saw dust was osage orange saw dust.* In the same chicken house was found McWhirter's saw *that had a defective tooth*; from the teeth of this saw was taken *fresh osage orange saw dust.*

When the saw was fitted upon the clubs where the same had been freshly sawed it was found that the indenture in the clubs and the defective tooth in the saw *fitted exactly.*

A piece of cloth with holes cut in it was found in the yard, formed in the shape of a mask, but it was so large that it would not stay upon any man's head and would almost go over the head of a horse.

From this fence, four feet high, near the water closet, two boards were found knocked off and *carefully set up against the fence upon the alley side.*

These boards had been knocked off from the inside with fifteen strokes on one board and sixteen upon the other with a hatchet or hammer having an octagon face. A hatchet was found in the wood house of McWhirter having such octagon face, and it fitted into a number of the indentures in the boards exactly.

There was some conflict in the evidence as to the *number* of shots fired, as to whether there were six or seven.

The first person who came to the scene was the witness, Thomas Rhodes, and he was at the alley fence almost as soon as the shooting ceased, and saw no one but the assured lying in the yard and his wife beside him. (Tr. pp. 125–126–127.)

These are briefly the main facts shown by the record connected with the death of Louis B. McWhirter, the assured.

The case was tried before a jury, who rendered a verdict for the plaintiff for the full amount of both policies together with interest.

Points and Authorities.

I.

The demurrer should have been sustained for the following reasons:

First.

The complaint alleges as follows:

"And the plaintiff further alleges that each and *all* "of the several answers, warranties and agreements "*contained in the application for insurance which was and* "*is the basis of and a part of said policy, etc.*" (Tr, p. 5.)

Although showing upon the face of the complaint that there was an application and that it was a part of the contract of insurance, the complaint failed to set forth said application or to plead its legal effect.

The defendant demurred to the complaint upon that ground. (Tr. pp. 18–20.)

The Court overruled said demurrer. This ruling we submit was error, for the plaintiff in the Court below was violating all rules of pleading by pleading only *a part* of his contract and leaving the remainder of it to surmise or conjecture.

This identical point was before the Supreme Court of the State of California in the case of *Gilmore* vs.

The Lycoming Fire Ins. Co., 55 Cal. 124, where the Court, by McKinstry, J., says: "The demurrer to the "complaint should have been sustained. Where a "party relies upon a contract in writing, and it affirm-"atively appears that all the terms of the contract are "not set forth in *heac verba*, nor stated in their legal "effect, but that a portion which may be material has "been omitted, the complaint is insufficient."

See also

Tischler *vs.* The Cal. Farmer's M. I. Co., 66 Cal. 179.

These cases, we think, are decisive of the point even if they were needed to assist out the general will of pleading that a pleader must plead an entire contract and not a part of one.

Second.

The complaint is insufficient, and defendant's demurrer should have been sustained thereto for the reason: that it fails to show upon its face that proof of death or evidence of death had been received by the defendant Company thirty days before the action was commenced. The complaint alleges that the Insurance Company agree to pay the said beneficiary Nannie S. McWhirter, etc., "*within thirty days after* "*due and satisfactory evidence of the death of said insured;*" but it failed to allege that said thirty days had expired before the action was commenced.

This was a necessary and essential obligation.

Cowan *vs.* The Phenix Ins. Co., 78 Cal., 188.

Doyle *vs.* The Phenix Ins. Co., 44 Cal., 267.

Abbott *vs.* Aslett, 1 Mees & W., 209.
Irving *vs.* Excelsior Ins Co., 1 Bosw., 514.
Campbell *vs* Charter Oak, 10 Allen, 218.
Williams *vs.* Knighten, 1 Oregon, 234.
May on Insurance, Sec. 589, page 1333, N. 6.

It will be readily seen from the above decisions that under the rule of pleading in this State that said complaint would not be sufficient, and the same rules are to be adopted and applied in the federal Courts within this jurisdiction.

Sec. 914 Revised Statutes, U. S.

For these reasons we think that the demurrer of of the plaintiff in error should have been sustained

II.

We submit that the ruling of the Hon. Circuit Court rejecting the testimony of E. F. Bernhard, was error. Plaintiff in error offered to prove by said witness that the insured had stated to him, some two years before his death, that he Louis B. McWhirter, had stated to the witness that if he, McWhirter, ever did any thing that would bring disgrace upon him or his family, he would kill himself. (Tr. pp. 235–236).

It had been shown that he had been arrested upon a criminal charge but a short time prior to his death. (Tr. pp. 226–227–228–229–230.)

It was shown that he felt the disgrace very keenly; that he had lost flesh over it; that it was worrying himself and his wife almost to death. (Tr. p. 230.)

It was shown that his trial on said charge had been set for September 22. (Tr. p. 130.)

In fact it was shown that just such a state of facts *had occured* which he had declared if did occur he would kill himself, and we submit that his prior declarations should have been permitted to go to the jury as a circumstance in connection with the other circumstances in the case, for the purpose of showing whether or not he did die by his own hand.

Then again, we submit, that the testimony was admissible for the purpose of showing the state of mind of said McWhirter; that he ever spoke of committing suicide under any circumstances was an inquiry pertinent to the issue. Louis B. McWhirter was on trial, as it were, for committing a crime, to wit, suicide. Let us reverse the matter and suppose that he had been on trial for killing some other person. Can it be said that his threat or declaration that under certain circumstances he would kill that person, and it was shown that the identical circumstance under which he said he would kill him had occurred; that said threat or declaration would not be admissible. We think not. Suppose he had said in 1889, that if John Smith slandered him he would kill Smith, and it was shown that in 1892, Smith had slanderded him and Smith was afterwards found dead, shot by some unknown person in the night time, in his own yard, and McWhirter was on trial for the homicide, would not the prior declarations of McWhirter be admissible? We think there would be no question about it. It must be remembered that all of the evidence in re-

lation to his death was circumstantial—the facts relied upon to prove suicide as well as the facts relied upon to prove assassination, and we submit that the evidence of the witness Bernhard was admissible under either theory, and that it was error to exclude it from the jury.

III.

Passing, for the present, the other assignments of error in ruling upon the admissibility of testimony, we pass to the charge of the Court, and the assignments of error in said charge.

The first error relied upon in said charge, is that portion of it relating to the presumption against suicide and the burden of proof.

The complaint alleges as follows: (Tr. p. 5.)

"That said Louis B. McWhirter did not die from "any cause in said policy mentioned" (suicide being one named), "but that he did die on the 29th of "August, 1892, at the City of Fresno, County of "Fresno, and State of California by being *murdered and assassinated* by certain persons to the plaintiff "unknown, etc."

The answer denies this allegation and alleges affirmatively that Louis B. McWhirter did commit suicide, and that he did die by his own hand. (Tr. p. 25.)

Hence the only issues raised by the pleadings as to the cause of death was *death* or *suicide*. There was no question of accidental death, and from his entire record there can be no inference drawn of any

accidental death. Louis B. McWhirter was either assassinated by some one unknown or he died by his own hand. In cases of this kind, which party has the burden? Upon whom does it lie to prove by a preponderance of evidence to show the cause of death? Upon the plaintiff who alleges that the death was not by suicide but that it was by assassination, or upon the defendant who denies such allegations and each of them.

The learned Judge in the Court below instructed the jury in his charge:

That the burden of proof was upon the defendant. (The Insurance Company) (Tr. p. 291), and that the presumption was that he did *not kill himself*. (Tr. p. 292.)

That particular portion of the charge referred to appears at the bottom of Tr. page 291 and the top of page 292 and is as follows:

"You are instructed *that the real issue in this case and* "*the one upon which the burden of proof lies upon* "*the defendant the Insurance Company*, *is whether Louis* "*B. McWhirter killed himself*, *and that whether any other* "*particular person killed him. If any other person than* "*himself killed McWhirter*, *the plaintiff* IS ENTITLED TO "RECOVER."

The presumption of law is, that "Louis B. "McWhirter, the decedent, *did not kill himself* and the "plaintiff is entitled to the benifit of that presumption, "until the same has been *overcome and rebutted by* "*satisfactory evidence*." (The italics are ours.)

This portion of the charge was erroneous, we submit. While it is true that there are many cases that hold that when it is a question as to whether the deceased's death was caused by *accident* or he committed suicide, the presumption is against suicide and in favor of accidental death, for the reason that suicide was in the nature of a crime, it was *self murder*, and contrary to the general conduct of mankind. It shows gross moral turpitude, and the law that holds all men innocent until their guilt is proven will not presume that a person committed suicide, but will presume against it. But the same argument applies with equal strength to the allegation that said decedent was assassinated. The law will not presume that one man murdered another, and hence in cases where the question is soley whether the deceased committed suicide or was assassinated there is *no presumption* whatever indulged in, and the burden is upon the plaintiff to prove the allegations of his complaint.

Trader's Ins. Co. *vs.* McConkey, 127 U. S. 661–667.

Where the entire question is disscussed and an instruction similar in character to the one given in this cause, was held error.

To the same effect is:

M. L. Ins. Co. *vs.* Hogan, 80 Ill. 35, 41.
Garrettson *vs.* Pegg, 64 Ill. 111.

It seems to us that the law is particularly and peculiarly applicable to the facts in this case.

For here we have no middle ground; no room for any inference of accidental death. Louis B. McWhirter was either murdered or he committed suicide.

Evidence was offered upon both theories, and can it be said or successfully maintained that there was a greater probability that some person murdered him, than that he murdered himself? We submit that such is not the law, and that as the plaintiff alleged in her complaint, that McWhirter did not commit suicide, but that he was murdered, that under the rule of law that the plaintiff has the affirmative, she should have been compelled to prove it, and that not only was there no presumption of law in her favor, but upon her was the burden; and again the Court in said charge, says:

"The presumption is that Louis B. McWhirter *did* "*not kill himself.*" Who then did kill him? He was undoubtedly killed. By said instruction the Court in effect told the jury that some other person killed McWhirter, and that the defendant Insurance Co. must show that he did not do so.

IV.

The next error which this plaintiff in error calls to the attention of this Court is the refusal of the Court to charge the jury, as requested by plaintiff in error, in Instruction XII, Tr. page 301. The Instruction was as follows:

"The question and answer referred to in Instruction "XI were a warranty upon the part of Louis B. Mc-"Whirter that there was no fact in his personal history

"that would increase the hazard or increase the "premium of said insurance, and you are instructed "that the only question for you to determine is as to "whether or not said warranty was true. It makes no "difference whether said representation was material "or not if you find from the evidence that the same "was untrue, then it is your duty to find a verdict for "defendant."

The question and answer referred to in Instruction XI were as follows:

"Is there any *fact* relating to your physical con- "dition, *personal* or family history, or habits which has "not been stated in the answers to the foregoing "questions, and with which the Company ought to be "made acquainted?"

The answer to that question was, "*No.*"

The question brought down to fit the exact facts of this case divested of all verbage would be as follows:

"Is there any *fact* relating to your *personal* history "which has not been stated in the answers to the fore- "going questions and with which the Company ought "to be made acquainted?"

Answer, "*No.*" (Tr. p. 300.)

The answer alleged that there had been a breach of warranty upon the part of the assured and the beneficiary by reason of said question having been answered falsely. (Tr. pp. 68–69.)

The applications for insurance which are attached to the answer, and made a part of the same, show the question and answer above referred to (Tr. p. 88), and show also the following question and answer.

"Q. Have you reviewed the written answers to the "above questions, and *are you sure they are correct and* "*true?*" Answer, "*Yes.*" (Tr. p. 88.)

The warranty signed by both the assured and his wife, the beneficiary herein and defendant in error, appears in full on pages 88–89, of the Transcript. By such warranty it was stipulated that all of said answers were warranted to be true, and it provided further: "that if there be in any of the answers "herein made any *fraud*, untruth, evasion, or con- "cealment of facts then any policy granted upon this "application shall be null and void, etc." (Tr. pp. 88–89.)

This was a warranty that there were no facts in his personal history that the Insurance Company ought to be made acquainted with and we insist that under all of the authorities which treat of the subject that the only question for the jury to determine is, were such answers *true or untrue.* If they were untrue they will avoid the policy. It is for the Court to determine as a question of law whether the questions and answers were a warranty, and it was the province of the jury to determine only their truth. But in the case at bar the Court below submitted the entire question to the jury, that of warranty; that of the truth or falsity, and the additional question as to whether said warranty was *material*, and refused to instruct the jury as requested by plaintiff in error, in Instructions XI and XII; but that portion of the charge which he did give in relation to said warranty was erroneous for the reason that he left the entire question to the

jury. As all of these questions are so closely related to each other, and as the authorities treat of them in the same cases, we will present them together, that is, the failure to give the instructions asked, and the error in the charge as given, and which appears on pages 284–285.

"A warranty must be strictly complied with, it "makes no difference whether it is a material or a "trivial fact."

Bliss on Life Ins., Sec. 36.

In *Ripley* vs. *Aetna Life Ins. Co.*, 30 N. Y. 136–163, the Court says:

"A warranty being in the nature of a condition "precedent and therefore to be performed by the insured "before he can demand performance of the contract on "the part of the insurer, it is quite immaterial for "what purpose or with what view it is made, or "whether the insurer had any view at all in making "it. But being once inserted in the policy, it becomes "a binding condition on the insured, and unless he "can show that it has been *literally fulfilled* he can "derive no benefit from the policy."

We submit that the authorities are uniform both in the United States and in England, that a warranty which is false avoids the policy and that the question of materiality has no bearing in the case of warranty.

Bliss on Life Ins., Sec. 39.

Anderson *vs.* Fitzgerald, 4 H. of Lds. cases 484.

Brady *vs.* United Life Assn., 60 Fed. Rep. 727.

Cobb *vs.* Covenant Mut. Benefit Assn., 25 N. E. (Mass.) 230.

Baumgart *vs.* Modern Woodman (Wis.), 55 N. W. 713.

Fisher *vs.* Crescent Ins. Co., 33 Fed. Rep. 544.

Jeffries *vs.* Life Ins. Co., 22 Wall. 47.

Aetna Life Ins. Co. *vs.* France *et al.*, 91 U. S. 510.

Phoenix Life Ins. Co. *vs.* Radden, 120 U. S. 183.

Clements *vs.* Supreme Assembly R. S. G. F., 131 N. Y. 485.

When a policy of insurance to title to land says that any untrue answer in application, etc., shall avoid the policy, answers amount to a warranty, and there can be no question as to the materiality of the same.

Stensgoard *vs.* St. Paul, 52 N. W. Rep. (Min.) 910

Where truth of representations is warranted in the policy, it is error to instruct the jury as to the materiality of representations.

Noone *vs.* Transatlantic F. I. Co., 88 Cal., 152.

An application for insurance warranted the answers to be full, correct and true. A false answer was found in the application. *Held*, avoided policy.

Wilkins *vs.* Mut. Reserve, etc., 7 N. Y. S., 589.

Where the policy declares that the representations in the application are warranted to be true, and that the policy shall be void if they are untrue, falsity in the representations will defeat the policy.

Gluting *vs.* Met. L. I. Co., (N. J.) 13 Atl. Rep., 4.

Custman *vs.* State I. Co., (Or.) 18 Pac. R. 466.
Phenix I. Co. *vs.* Benton, 87 Ind., 132.

If the insured at the time of making his application, was in apprehension of incendiarism, and represented that he was in no apprehension, he cannot recover.

Whittle *vs.* Farmsville Ins., etc. 3 Hughes (Circuit Ct.) 421.

In an action upon a policy conditioned to be void for misrepresentation, the fact that the assured died from a *fall* and not from the effect of previous disease (about which the previous misrepresentation had been made) does not entitle beneficiary to recover.

Venner *vs.* Sun Life Ins. Co., 17 Carr. S. C. R., 394.

In life insurance, if the application and policy make the contract conditional on the correctness of the answers, an untrue answer will defeat the policy.

Neill *vs.* Am. Pop. L. Ins. Co., 42 N. Y. Supr. Ct. 259.
Ritzler *vs.* World, etc., 42 N. Y. 809.
Barteau *vs.* Phoenix, etc., 67 Barb. (N. Y.) 354.

Concealment of the fact that applicant feared vessel lost. *Held*, made policy void.

Hart *vs.* British Ins. Co., 80. Cal., 440. (This was a clear case of concealment of facts.)

A concealment in respect to a matter inquired for is fatal, though not material.

Farm Ins. Co. *vs.* Thomas, 10 Brad., 545.

Where a party stipulates in his application for a life policy that all his statements therein are material, and that falsity in any of them shall avoid the contract, the Court cannot, without an enabling statute, pronounce any of them immaterial.

Johnson *vs.* Maine R. R., 83 Me. 183.

There seems to have been some confusion in the charge of the Court arising, no doubt, from the fact, that a warranty in an application and policy was considered in the same light as a representation, as the Court evidently instructed as to representations and not as to warranties. But a sharp distinction is made in all the authorities between warranties and representations. The former must be true, whether material or immaterial, while some of the authorities hold that a representation must be of a material fact to void the policy.

Mut. Benefit Life Ins. Co. *vs.* Miller, 39 Ind. 475.
Mut. Benefit Life Ins. Co. *vs.* Robertson, 59 Ill. 123.
Moulon *vs.* American Life Ins. Co., 111 U. S. 335.
Mut. Benefit Life Ins. Co. *vs.* Robinson, 7 C. C. A. 444; same case, 58 Fed. Rep. 723.

Statements in an application for insurance, made a part of the contract and expressly declared to

be warranties, cannot be construed to be representations.

Prov. Savings Life Assn. *vs.* Llewellyn, 7 C. C. A, 579. Same case, 58 Fed. Rep. 940.

Brady *vs.* United Life Assn. (C. C. A.), 60 Fed. Rep. 727.

The fact that the deceased believed the statements in the application to be true is no defense to a breach of warranty. "The warranty of correctness is "absolute," says Bliss on Life Insurance, "It was not "that the statement it believed to be true by the party "who makes it, but that it is true in point of fact."

Tested by the foregoing authorities, we think the instructions given by the Court on this defense were erroneous, and that the Court improperly refused to charge the jury as requested by the defendant. According to the instructions given by the Court, the question is left to the jury to determine as to whether a material fact was concealed by a false answer given to question number eleven, if such false answer was given, and it was also left to the jury to determine whether the deceased knowingly gave a false answer. The portion of the charge which is particularly erroneous in this regard is found on page 284 of the Transcript, and is as follows: "And if you find that "such threats had been made, and that such danger "existed, and he knew it, and that the facts so with-"held from the knowledge of the insurance company "were material facts, then your verdict should be for "the defendant."

That the allegation of the answer in relation to the assured, Louis B. McWhirter, being in fear of being killed, was fully proven. (See Tr. pages 151–162–231–232–233–234–5–268.)

He, the assured, even went so far in his statements to the witness, J. A. Lane, whom he was endeavoring to prepare for a witness, as to state that he had informed the insurance companies *that they were taking an unusal risk*. (Tr. p. 163.)

Notwithstanding that he knew that such was the fact, he in effect and in law warranted to plaintiff in error that it *was not* taking any unusual risk, that there was nothing in his history which they ought to know, when by his own statement he knew said warranty to be untrue.

And again, he expected that his wife would have trouble with the insurance companies, and he wanted Lane to be a witness against them. (Tr. p. 163.)

Why was he in his life-time speaking of such trouble after his death, if he was not going to kill himself and if he had made no false statements in his application.

"The wicked flee when no man pursueth."

All of the evidence in relation to his expecting to be killed stands uncontradicted. There is not even a conflict of evidence upon the question, and this being a warranty, and the unconflicting and uncontradictory evidence showing such warranty to be false, we submit that the judgment of the Court below should be reversed on the ground that it is contrary to the evidence.

V.

But the gravest error in the entire proceeding was, we submit, in the Court finally in its charge taking away from the consideration of the jury, the questions of breach of warranty and fraudulent concealment, and submitting to them only the question of suicide. (Tr. p. 291.)

The Court charged the jury in the following language without any qualification: "If any other "person than himself killed McWhirter *the plaintiff is* "*entitled to recover.*"

And again on page 193 the Court charged the jury:

"You are further instructed that *the entire theory* of "defense in this case is based upon the *assumption* that "Louis B. McWhirter prepared the clubs, etc." And further on, on the same page, the Court said:

"If you should find from the evidence that Louis "B. McWhirter did not make such preparations; "that he did not saw the the Club found upon "his premises; that he did not prepare the mask; that "he did not own or possess both pistols; that he did "not fire all the shots, the bullet holes of which were "found in the fence and out house and on his own "body, *your verdict should be for the plaintiff.*"

If the jury obeyed this instruction they must find for the plaintiff if they believed that McWhirter did not commit suicide, for there was no limitation put upon the language at all. They were told that the *entire theory* of the defense was as stated in that portion of said charge. This was a mistake, for the theory was a breach of warranty, a fraudulent con-

cealment and suicide, and the jury might have found each and every one of the facts stated in said portion of the charge, and yet the defendant been entitled to a verdict upon its other defenses; and so with the other portion of the charge, that if they believe McWhirter did not kill himself then they should find for the plaintiff. Under the evidence and pleadings in this case the jury might have believed that McWhirter did not kill himself and nevertheless defendant have been entitled to a verdict on the other issues.

Then again, we submit, that it was utterly impossible for the jury to obey this portion of the charge and that portion appearing upon Tr. pages 283–284, where the Court charged in relation to concealment, etc., for by that portion of said charge they were told that if said McWhirter concealed certain facts they should find for the defendant, and in the other portion they are informed that the *entire theory* of the defense is of such a character that it excludes all questions *except suicide*.

We submit that there can be no question but that said portion of the charge was erroneous and that it tended to mislead the jury.

VI.

Instruction XI should have been given. It stated the law correctly, as we have shown by the authorities, and was not covered by any other portion of the charge. For Instruction XI was asked upon the ground and to sustain the theory of a breach of

warranty and the charge as given by the Court had reference to a fraudulent concealment (see page 284, and instruction specially upon the question of materiality, that the jury must find such answer was material, etc.,) but the instruction asked was upon an entirely different theory and we submit that it should have been given.

VII.

Instruction XIII, was correct as a statement of the law applicable to the facts of this case, as we have shown by the authorities herein cited, and should have been given.

North American Fire Ins. Co. *vs.* Throp, 22 Mich. 165–166.

Curry *vs.* Commonwealth Ins. Co., 10 Pick 535.

Bebee *vs.* Hartford M. F. Ins Co., 25 Conn. 51

N. Y. Bowery Fire Ins. Co. *vs.* Ins. Co. 17 Wend. 359.

And the evidence which we have herein referred to shows conclusively that the said instruction was justified by the evidence.

For these reasons plaintiff in error submits that the judgment should be reversed and a new trial granted.

Respectfully submitted,

JAS. H. BUDD,
J. C. CAMPBELL,
Attys. for Plaintiff in Error.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Plaintiff in Error,

VS.

NANNIE S. McWHIRTER,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

CRITTENDEN THORNTON,
F. H. MERZBACH,
W. P. THOMPSON,
Counsel for Defendant in Error.

GEO. SPAULDING & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

FILED
FEB 13 1895

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
NANNIE S. McWHIRTER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This is a writ of error from a judgment of the Circuit Court of the United States in and for the Ninth Circuit and Northern District of California, in an action in which Nannie S. McWhirter, the present defendant in error, was plaintiff, and the Connecticut Mutual Life Insurance Company was defendant. The action was brought to recover the sum of fifteen thousand dollars with interest, upon two policies of insurance, the first in the sum of $5,000, and the second in the sum of $10,000, upon the life of one Louis B. McWhirter, deceased. The first of said policies was issued by the defendant upon the 19th day of December, 1891. The second policy was issued by the defendant upon the 15th day of March, 1892. The complaint was filed in the Court below upon the 7th day of January, 1893. It contains two counts, one upon each policy. The defendant appeared and demurred to the complaint, which demurrer was overruled by the Court, after full argument. Subsequently the defendant

answered the complaint. In this answer two defenses were made: First, that the insured, Louis B. McWhirter, deceased, had committed suicide; second, that the insured had fraudulently suppressed and concealed certain facts material to the risk. Upon these issues a trial was had before a jury, which terminated in a verdict for the plaintiff for the full amount of both policies, with interest up to the date of the verdict. Judgment was thereupon entered in favor of the present defendant in error, from which judgment this writ of error has been taken.

As we have hitherto stated, the defenses alleged were suicide and fraudulent concealment and suppression of material facts by the insured.

Inasmuch as a verdict or finding in an action at law cannot be assailed as contrary to the evidence in a federal court upon a writ of error, we should not deem it necessary to answer or comment upon the statement of facts set forth in the brief of counsel for plaintiff in error, were it not that such statement so far deviates from our understanding of the facts as they appear in the evidence that we deem it our duty to deny its statements and rebut the inferences which counsel for plaintiff in error seek to draw therefrom.

The deceased, Louis B. McWhirter, at the date of his death, which took place on the 29th day of August, 1892, at the city and county of Fresno, was of the age of thirty-eight years. He was a lawyer by profession. He was a married man, with one child, then of the age of about three years. Though without fortune himself, he was the son of parents in comfortable circumstances, and his wife was a young lady of some present estate, with handsome

expectations from her mother, who was a lady of large wealth. At the time of his death Louis B. McWhirter was in vigorous health and in the full flush of manhood. He had not accumulated any estate at that time. He enjoyed the respect and confidence of a large number of persons in the community in which he resided. Although without credit, based upon pecuniary standing from the point of view of banks and bankers, he was universally considered an honorable man, prompt to defray his obligations. There is not a scintilla of evidence in the entire record of the case at bar that at the time of his death he was indebted for more than the sum of $500. At the time of his marriage to his present wife, formerly Miss Blasingame of Fresno county, he was without any acquired fortune. At that time Miss Blasingame was worth, or supposed herself to be worth, about $15,000. This was her separate estate, entirely apart from any expectations or inheritance to be realized upon the death of her mother.

In the brief for plaintiff in error on file in this case, many statements are made which are conclusively refuted by the facts as they appear in the record. Louis B. McWhirter is pictured in that brief as a man whose whole career, personal, political and professional, had been a failure; who had reached the age of thirty-eight without having acquired a competency; who had dissipated his wife's fortune; who was under arrest upon a criminal charge involving moral turpitude; who was surrounded by enemies; and who had reasonable cause to believe that his life would be attempted by the latter.

The explanation of these statements is prompt and

easy. It appears in evidence that at the time of the marriage of Louis B. McWhirter to Miss Blasingame she was the owner of a mortgage from one John C. Rorden for $150; of another mortgage from J. A. Land for $1,000; of another mortgage from J. Ferber and Annie Ferber for $400; that all of these mortgages were paid and satisfied of record within one year after the marriage; that shortly after her marriage Miss Blasingame executed a deed to her mother for the sum of $850 of certain property in the town of Fresno; that she made a mortgage to the Farmers' Bank of Fresno of certain other property for $600; another to the Fresno Loan and Savings Bank for $400; another to the same for $1,500; another in conjunction with her husband to the same for $1,000. It was also proved that after the marriage, Mrs. McWhirter, formerly Miss Blasingame, executed a deed to W. D. Tupper of a piece of land in the town of Fresno, and received back from said Tupper a mortgage for $775. From these mortgages and conveyences it followed that Miss Blasingame received $1,550, at dates recently prior to her marriage to the deceased, and that she made mortgages upon her estate for the aggregate sum of $4,350 within six months after her marriage to McWhirter; that she likewise received $775 from W. D. Tupper on the first of February, 1889. It therefore appears that the total sum of $6,665 passed through the hands of Mr. and Mrs. McWhirter within a year before and a year after their marriage.

There is no evidence whatever that the payment of the mortgages made to Mrs. McWhirter and the payment by her of mortgages made by her completely exhausted her

estate; on the contrary, there is direct and positive evidence to the effect that she still had a reasonable amount of property. At the time of her marriage to the deceased she estimated her property at from $12,000 to $14,000, and at the time of her husband's death there was an indebtedness on the same of some $3,200 to $3,500.

But the charge of dissipation of his wife's estate, which is brought against the deceased, is explained by the plaintiff in a most satisfactory manner. The mortgage to the Fresno Loan and Savings Bank for $1,500, dated May 15, 1889, was expended in improvements upon the property upon which she resided after her marriage, and has ever since retained. The sum of $400, raised by the mortgage to the same bank on July 31, 1891, was expended in a visit to San Francisco on account of her infant, who was then very ill. The $700, which was obtained by the sale of certain property in Fresno for that sum, was received before the marriage of the plaintiff with her late husband, and used in the purchase of her wedding outfit. A sum of from $275 to $325 of the moneys raised from these various sales and mortgages was expended in paying for the grading of streets in front of lots owned by the plaintiff in the city of Fresno, and the taxes upon her property. It thus appears that the charge of having married a woman, and dissipated her estate, is totally without foundation; that $1,500 of the sums raised by mortgage upon her separate property was expended in the erection of a dwelling, which constituted the home of the family, and which she still owns; that seven hundred dollars of that sum was expended in her wedding outfit, and that $400 was likewise expended in

a trip to San Francisco for the purpose of procuring medical assistance for her infant who was then ill. The entire amount which could by any possibility have been expended by the deceased for his own uses and purposes, raised out of his wife's estate, was the sum of $3,825, a sum of less than $100 per month during the entire existence of the community. The charge of dissipation of his wife's estate is therefore conclusively refuted. If she was worth from $12,000 to $14,000 at the time of her marriage, she still has more than three-fourths of that sum in money or money's worth.

The charge of lack of professional success is based entirely upon the assumption that a man who has accumulated nothing in the profession of the law at the age of thirty-eight is, necessarily, a man who has failed in his profession. This would be a hard rule to apply to the most distinguished practitioners that have ever graced the profession. Daniel Webster's debts were paid twice by popular subscription taken up in the city of Boston, after he had been a member of the House of Representatives, the Senate, and the Cabinet of the United States. The statement that a man is necessarily a failure, who has accumulated nothing in the practice of the law at the age of thirty-eight, is one which is not borne out by the general experience of the profession. It is true that he had been compelled to draw upon his parents for money. He had come into a new country, and was a comparative stranger. In the long and weary struggle to establish himself in the practice of the law, which is the lot of every man entering upon the profession, he had been compelled to invoke the assistance of those upon whom

he was entitled to make a claim by the law of nature. This claim was frankly admitted and complied with. True, he had been compelled to borrow money from his friends for the purpose of procuring an outfit for his wedding, but this sum was honorably repaid. He was a man without credit at banks or among bankers, but the same banker who refused to lend him the funds of the bank of which he acted as manager, lent him his personal funds to the extent of $250 without taking a note and without demanding security. This money was honorably repaid.

He had been arrested upon a criminal charge, but the charge was not brought to trial. The complaint against him was lodged in the Police Court of the city of Oakland on the 15th day of March, 1892, and had never been brought to trial up to the time of his death, which occurred on the 29th of August of the same year. He was admitted to bail upon the charge in the trivial sum of $200. The charge was the outgrowth of a dispute concerning a debt, which he alleged to have been fraudulently contracted by his accusers. It was an attempt, frequent in the annals of our Police Courts, to offset one charge by another. It was totally baseless, and was not urged by the prosecutor.

The statement of facts in the brief of counsel for plaintiff in error in this case exhibits an ingenious attempt to dovetail and piece out the evidence on two inconsistent charges, that of suicide, and that of fraudulent suppression of the fact that his life had been threatened and that he expected to be murdered. The inference of suicide in this cause is based upon the then situation of

McWhirter personal, professional and financial. The defense of fraud and concealment is based upon his alleged expectation that certain lawless persons would take his life. Much of the evidence which was introduced was applicable in one respect to the theory of suicide, and very little to the alleged defense of fraudulent suppression. We shall endeavor hereafter to segregate the testimony offered by the defendant, and show in what respect it is palpably insufficient to sustain either of the attempted defenses.

The theory of suicide in the case at bar is based upon an inference alleged to be the inevitable result of the facts alleged to appear from the evidence introduced at the trial in the Court below by defendant in error. These facts were, that McWhirter rose from his bed at or about three o'clock on the morning of the 29th of August, 1892; that he had heard a noise in the back yard of his premises; that he put on his shoes and trousers, took his revolver, spoke to his wife, went out of the front door of his house, went to the back yard, and was there killed by a pistol shot. It is contended by the counsel for the plaintiff in error that at that time six, and only six, shots were fired; that the deceased fired all six of them; that two revolvers of the same caliber, each of six chambers, and each with three discharged and three undischarged chambers, were found in reasonable proximity to his body; that two clubs of osage orange were found likewise near his body; that these clubs had been sawed by a saw subsequently found upon McWhirter's premises; that a piece of cloth formed in the shape of a mask, with holes cut in it for eye holes, was likewise found near his body;

that two boards were knocked off the rear fence of his premises and set up against the fence on that side fronting upon an alley which ran at the rear of his house; that those boards had been knocked off from the inside by a hatchet found in an outhouse on McWhirter's premises; that the first person who reached the scene was one Thomas Rhodes, who testified that he saw no person fleeing from the scene of death; that osage orange sawdust was subsequently found in a chicken house upon the premises of the deceased; that ropes were found tied upon the osage orange clubs, ostensibly to attach them to the wrists of the holders, which were made of cotton clothes line which were identical with the clothes line in the back yard of McWhirter's premises. From these facts the inference is deduced by the counsel for plaintiff in error that the deceased had prepared a sham scene of murder, and had then killed himself; that the whole arrangement of the scene was for the purpose of deceiving the insurance companies, and to lead their agents to the erroneous conclusion that McWhirter had been murdered; that his purpose was to kill himself, and by the act of suicide to endow his wife and orphan child with a fortune.

Against this alleged series of facts, evidence was adduced by the plaintiff which showed the following facts indisputably:

First. That McWhirter had never owned nor seen the six-chamber revolver marked with the triangle and the letter "H," found near his body.

Second. *That seven shots were fired*, conclusively indicating the presence of at least one other person at the

scene at the time of his death, even conceding both of the pistols found near the body to have been McWhirter's.

Third. That the sawdust found in the chicken-house in McWhirter's back yard had been placed there in the perpetration of a nefarious and infamous attempt to manufacture evidence in support of the theory of suicide by one Bury, a detective formerly employed by the authorities of the county of Fresno to ferret out the murderers of McWhirter and bring them to justice.

Fourth. That the alleged sawdust found upon the teeth of the saw alleged to have been found upon McWhirter's premises might have been dust produced by the sawing of any one of six different kinds of wood, and that no witness could positively affirm that it was osage orange sawdust.

Fifth. That the rope found upon the clubs, for the supposed purpose of attaching the same to the wrists of the carriers, was the ordinary clothes-line in general use throughout the city, county and State, of which hundreds of feet were then in use in every back yard in the town of Fresno.

It therefore appeared distinctly from the evidence that the theory of suicide had broken down completely. It rested entirely upon proof of the fact that McWhirter had owned, or had in his possession at the time of his death, the two pistols found near his body, and that but six shots were discharged in the affray. If, on the other hand, McWhirter had never owned, seen nor possessed but one of the pistols—if, in fact, seven shots were fired in the affray, the presence and agency of some third person in his death is indisputable. When to

this is added the fact that tracks were found of two persons advancing to and retreating from the rear gate of his premises, and in entering and departing from his back yard, the inference of the presence and agency of at least two assassins is inevitable, and the theory of suicide is conclusively rebutted.

On the other hand, the evidence as to the fraudulent suppression and concealment of the fact by the insured that his life had been threatened by certain evil disposed persons, animated by motives of personal enmity to himself, is equally weak and inconclusive. As we have previously remarked, the first of the policies sued upon in this action was dated December 19, 1891, and the other March 15, 1892. The application upon which the first policy was issued was dated November 19, 1891; that upon which the second policy was issued was dated March 7, 1892. It is certain that to constitute a fraudulent suppression or concealment in regard to the alleged threats of persons to take his life the same must have existed and come to the knowledge of the insured prior to those dates respectively; and there is not in the record of this case any testimony in the remotest degree tending to show such a state of facts.

In support of this defense the counsel for plaintiff in error refer in their brief (p. 11) to the testimony of J. H. Lane (Trans., p. 150) and of Thomas H. Bates (Trans., p. 232).

It is essential that the alleged threats and the knowledge thereof should have existed prior to, or at the time of the making of the applications for the policies respectively.

There is no testimony of J. H. Lane upon page 150 of the transcript. There is some testimony of this witness to be found on that subject at page 162 of the transcript, in which the witness described a conversation with McWhirter which took place in April, 1892. This was nearly five months after the application for the first policy, and nearly, if not quite a month after the application for the second. This falls far short of any proof that either the threats had been made, or the knowledge thereof by McWhirter had existed, prior to the 17th of November, 1891, or the 7th of March, 1892.

The evidence of Bates at page 232 is equally inconclusive. That witness testifies in regard to a conversation had with McWhirter about three months, or may be more, before his death. Inasmuch as his death took place on the 29th day of August, 1892, three months before his death would have been the 29th of May; four months before his death would have been the 29th of April; five months before his death would have been the 29th of March, which was three weeks after the issuance of the second policy; six months before his death would have been the 29th of February; seven months before his death would have been the 29th of January; eight months before his death would have been the 29th of December, 1891; nine months before his death would have been the 29th of November, 1891. No other conversation or the date thereof is referred to with any degree whatever of accuracy, either as to time or substance, by any witness in the brief of counsel for plaintiff in error. A slight and indistinct reference was made by the witness J. E. Baker (Trans., p. 269), to a few re-

marks made by McWhirter on the day before his death, which was the 29th of August, 1892. This was five and ten months respectively after the making of the application for both of the policies in question.

Argument.

I.

The first point made by counsel for plaintiff in error is that it appears on the face of the complaint that only a part of the contract is set forth in the complaint and that the demurrer should have been sustained for that reason.

In support of this point the case of *Gilmore* vs. *The Lycoming Fire Insurance Company*, 55 Cal., 124, is cited. Of this case it is sufficient to say that it has been explained, if not overruled, by subsequent decisions in this State. In *Cowan* vs. *The Phœnix Insurance Company*, the case of *Bobbitt* vs. *The Liverpool and London and Globe Insurance Company*, 66 N. C.,70 (upon the authority of which latter case the decision in *Gilmore* vs. *Lycoming Fire Insurance Company* was based), was explained, and it was held that the complaint was sufficient. This case was followed by the case of *Blasingame* vs. *Home Insurance Company of New York*, 75 Cal., 633, in which it is held "that in an action on a policy of fire insurance the complaint must aver the loss, and show that it occurred by reason of a peril insured against, but it need not aver the performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from the excepted risks."

These cases have in effect overruled the case of *Gilmore*

vs. *The Lycoming Fire Insurance Company*, which was itself a deviation from the general rule of pleading that in an action upon a written contract it was sufficient for the compiaint to set forth the substantial promise or contract which he claimed to have been broken by the defendant.

II.

But under any circumstances the fault in the complaint herein, if any there be, is cured by the pleading of the defendant. Whatever may have been the conditions, exceptions or limitations of the defendant's covenant or promise which were omitted in the complaint, they are fully set forth and made to appear by the answer herein, which sets forth the application and policy in each case in full. In such a state of the pleadings the error or defect, if any there was, is cured.

"If one of the parties expressly avers or confessed a material fact before omitted on the other side the omission is cured. For the defect in the pleading of the one party is thus supplied by the pleading of the other, and it may thus be made to appear, from the pleading on both sides taken together, that he on whose part the omission occurs is entitled to judgment, although his own pleading, taken by itself, be insufficient."

Gould's Pleadings, 166.

"If, however, the adverse pleading expressly admits the fact which ought to have been stated in the defective pleading, and which is substantially incorrect in omitting it, the error it seems becomes immaterial; as, in the instance before put, of a declaration in trespass in taking goods, omitting to show any title to or possession of the

goods, and the plea admitting the defendant's possession."

> 1 Chitty's Pleadings, 705; (16th Am. Ed.)
> *Hawthorne* vs. *Smith*, 3 Nevada, 193.
> *U. S.* vs. *Morris*, 10 Wheaton, 287.
> *Whittemore* vs. *Ware*, 101 Mass., 355.
> *Vinal* vs. *Richardson*, 13 Allen, 52.
> *Burns* vs. *Cushing*, 96 Cal., 669.

The case of *Tischler* vs. *California Farmers' Fire Insurance Company*, 66 Cal., 178, contains nothing in support of the point made by counsel for plaintiff in error. *Gilmore* vs. *Lycoming Fire Insurance Company* is referred to incidentally by the Court upon a certain proposition, but without approval of the point therein laid down or analysis of its reasoning.

III.

The second point made in support of the demurrer to the complaint herein is frivolous. It is alleged in both counts of the complaint (Trans., pp. 5–10), "That due notice and satisfactory evidence of the death of the said assured, Louis B. McWhirter, was delivered to, and received by, the said defendant, at its office in Hartford, Connecticut, prior to the first day of December, 1892." The complaint herein was filed, as appears by the endorsement of filing by the Clerk of the Superior Court of the City and County of San Francisco on January 7, 1893 (Trans., p. 11). It therefore necessarily appears with absolute mathematical precision that more than thirty days, in fact thirty-eight days, must have elapsed and expired after due and satisfactory evidence of the

death of the insured had been received by the defendant before the commencement of this action. Conceding, for the sake of the argument, that such an allegation is necessary, it does not follow that it must be made in exact terms. It appears as inevitably that thirty-seven days have elapsed between the receipt of the proofs of death and the commencement of the action as it could possibly appear by a direct and positive statement that that number of days had in fact elapsed. It appears as certainly, as if in a certain case the allegation should be material that a man was eighty years of age at the time of his death, it should be alleged that he was born on the 1st of January, 1800, and died on the 2d of January, 1880. The authorities cited do not sustain the allegation. Only one of them makes the most distant reference to the immediate question upon which it is cited, and there was not in any of the pleadings in any of those cases any allegation from which the fact that thirty days had elapsed followed inevitably as a natural and mathematical consequence.

Abbott vs. *Aslett*, 1 Meeson & Welsby, 209, is a case decided under the former practice in England, under which practice the suing out of the writ, and not the filing of the declaration, constituted the commencement of the suit. It might well in that case have been that three months may have elapsed at the time of the filing of the declaration, but not at the time of the suing out of the original writ which was the commencement of the action. But, under our practice, the commencement of the action is the filing of the complaint, for which reason the case cited is totally inapplicable.

IV.

The next exception discussed by counsel for plaintiff in error was the ruling of the presiding Judge rejecting the testimony of E. F. Bernhard, which is found in the transcript at pages 235 and 236.

The testimony of the said Bernhard was in reference to a certain declaration of the deceased made about four years prior to the trial of the action. The trial of the case began on the 23d day of January, 1893. The conversation, therefore, took place at or near the month of January, 1889, which was about three years before the application of the deceased for either of the policies which form the subject of this action. It is contended that the evidence tended to show a suicidal purpose on the part of the deceased. The conversation arose under these circumstances: The witness Bernhard and the deceased had attended a banquet at the house of a certain Mr. Grady, and he was questioned by counsel for plaintiff in error in regard to a conversation in reference to suicide had with McWhirter in returning to their respective homes after the banquet. The conversation was in substance and effect that if he, the said McWhirter, ever did anything which would disgrace himself or his family, he would kill himself, or that he would kill himself if he ever did anything that would bring disgrace upon himself and his family. In response to a question of the learned Judge who presided at the trial in the Court below in reference to the connection in which this conversation arose, the witness replied: "We were discussing, to the best of my recollection, some of the history, you might term it, of another person, and in that

connection this conversation arose out of that." The evidence proposed to be elicited from the witness was objected to by counsel for the defendant in error, upon the ground that it was too remote; and, second, that it involved a comparison of the life, character, habits and circumstances of McWhirter with those of a third person. The objection was sustained on both grounds, and upon both grounds should be sustained by this Court. A random declaration made by a witness, or by a person insured, under the influence of the circumstances which usually attend a convivial gathering of that character, made three years at least prior to the application for insurance, and involving a comparison of the character, habits and actions of the declarant with those of a third person, is too remote and unsatisfactory to be the basis of a judicial finding, or the verdict of a jury. In the first place, it is too remote. Such a suicidal purpose, if it ever existed, might, and in all probability did, disappear upon reflection and increase of wisdom through age. In the second place, the declared purpose was conditional upon bringing disgrace upon the family of the declarant and the declarant himself, and upon his resemblance, or equality, or similarity in situation, character and habits to a third person. It involved an investigation by the Court into the character and habits of the third person mentioned, and a comparison of that character and those habits and actions with those of the decedent. It was purely collateral, and without weight in determining the issue.

V.

The next exception discussed by counsel for plaintiff in error relates to the burden of proof. An all-sufficient

answer to this exception is that upon the trial of this action the plaintiff in error claimed, demanded and assumed the burden of proof, and in pursuance of its claim and demand the Court in its discretion granted to it the important and substantial right to open and close both in evidence and upon the argument. Reference to the transcript on page 78 will show this assertion to be well-founded. The attempt to gain a substantial advantage in the Court below by demanding and assuming the burden of proof, and to repudiate that assumption after having lost the cause, is a method of practicing law which should meet the severe condemnation of this Court. But the ruling of the Court upon the burden of proof was correct under all the authorities.

> *Dennis* vs. *Union Mutual Life Insurance Co.*, 84 Cal., 570.
>
> *Blasingame* vs. *Home Insurance Co.*, 75 Cal., 635.
>
> *Home Benefit Assn.* vs. *Sargent*, 142 U. S., 700.

The case of *Traders Insurance Co.* vs. *McConkey*, 127 U. S., 661, cited on this point by counsel for plaintiff in error, is totally inapplicable. That was a case in which the defendant made a policy of life insurance, in which it covenanted to pay upon the happening of a sole and single event, that was, the death of the insured by accident or accidental means. We should cheerfully concede, without the authority of the Supreme Court of the United States, or of any other court, that in an action upon such a policy the burden lay on the plaintiff to prove that the death of the insured happened by accident or accidental means, but in the case at bar the covenant of the defend-

ant is to pay in case of the death of the insured, with certain specified exceptions, and the burden of proof, according to all the authorities, lies upon the insurance company to bring itself within the exception.

The cases cited from Illinois of *M. L. Insurance Company* vs. *Hogan*, 80 Ill., 35, and *Garrettson* vs. *Pegg*, 64 Ill., 111, decide nothing more than the case of *Traders Insurance Co.* vs. *McConkey*, and are equally inapplicable to the proposition under discussion.

VI.

The next error alleged by counsel is the refusal of the Court to charge the jury as requested by the plaintiff in error in Instruction XII, which is set forth on page 301 of the transcript.

For the alleged error of the Court in refusing to give this instruction to the jury there are three sufficient reasons.

The question and answer in the application, upon which the ruling of the Court below was predicated, are the following: "Is there any fact relating to your physical condition, personal or family history, or habit, which has not been stated in the answers to the foregoing, *and with which the company ought to be made acquainted?*" The answer to that question was "No."

First. The question and answer taken together do not constitute a warranty on the part of the applicant for insurance. The question distinctly calls for the opinion of the applicant: Is there any fact, etc., with which the company *ought* to be made acquainted? This question embraces both the opinion of the person making the an-

swer and his moral obligation to state the fact. The question in that respect distinctly calls for a matter of opinion in either and both of its aspects. The task and burden of deciding the meaning of the question, and making an appropriate answer thereto, is thus thrust upon the applicant for insurance; and the question thereupon arises: Can a statement which is of itself, and by itself, by its necessary terms a conclusion and matter of opinion, be turned into a warranty by the agreement of the parties? We maintain the negative of the proposition. Cases are numerous in which the Supreme Court of the United States has held that notwithstanding an express declaration and covenant in a policy of insurance that certain statements therein contained should be held and deemed to be warranties, nevertheless, a fact stated as to a matter of opinion cannot be such as matter of legal conclusion.

In the case of *National Bank* vs. *Insurance Company*, 95 U. S., 673, it was held that a policy, which in terms stated that an application and survey of the premises insured should be a warranty, was, nevertheless, a mere representation as to the matters of opinion stated in the answers to the questions in the application. In this respect the Court says:

"It is the duty of the Court to reconcile these clauses of the written agreement, if it be possible to do so consistently with the intention of the parties, to be collected from the terms used. It will be observed from an examination of the questions propounded to the assured, that, among other things, he was asked whether the building was of stone, brick, or wood; how the premises were warmed; what materials were used for lighting them;

whether a watchman was kept during the night; what amount of insurance was already on the property; whether it was mortgaged, etc. These and similar questions refer to matters of which the assured had actual knowledge, or about which he might, with propriety, be required to speak with perfect accuracy. They are matters capable of precise ascertainment, and in no sense depending upon estimate, opinion or mere probability. But his situation and duty were wholly different when required to state the cash value of his property. He was required to give its 'estimated value.' His answers concerning such value were in one sense, and, perhaps, in every just sense, only the expression of an opinion. The ordinary test of the value of property is the price it will command in the market if offered for sale. But that test cannot, in the very nature of the case, be applied at the time application is made for insurance. Men may honestly differ about the value of property, or as to what it will bring in the market; and such differences are often very marked among those whose special business it is to buy and sell property of all kinds. The assured could do no more than estimate such value, and that, it seems, was all that he was required to do in this case. His duty was to deal fairly with the company in making such estimate. The special finding shows that he discharged that duty, and observed good faith."

May on Insurance, sections 156, 160, 164, 168, 169.

Elliot vs. *Hamilton Mutual Insurance Co.*, 13 Gray (Mass.), 139.

Fitch vs. *American Popular Life Insurance Co.*, 59 N. Y., 557.

Germania Fire and Life Insurance Co. vs. *Casteel*, 9 Chicago Legal News, 374.

Franklin Insurance Co. vs. *Vaughan*, 92 U. S., 516.

Yeaton vs. *Fry*, 5 Cranch, 342.

Moulor vs. *American Life Ins. Co.*, 111 U. S., 335.

Now, in the instructions quoted, three propositions are asserted:

First. That the question and answer referred to were a warranty on the part of the insured that there was no fact in his personal history that would increase the hazard or increase the premium of the insurance.

Second. That it made no difference whether said representation was material or not; and

Third, *by necessary implication by the omission to state the fact, that it made no difference whether McWhirter knew that such fact existed or not.*

In the first place, the fact alleged to have been concealed, and to which the evidence adduced by the defendant upon the trial was mainly directed, was the fact that certain persons had threatened the life of the insured. There was no evidence whatever that such threats had been made at or prior to the time of making the respective applications for the policies which form the subject matter of this action. By a necessary consequence the insured could not have known facts which then existed. The result of the proposition of law as stated in the in-

struction, therefore, is that a policy of insurance may be avoided by an erroneous statement by the applicant for insurance in regard to facts concerning which he had or could have no possible knowledge. For this reason alone the instruction should have been refused. The necessary implication from the question itself is that the fact inquired of, whatever it may have been, must have been within the knowledge of the person making the application for insurance. It is impossible that any system of law or jurisprudence, based upon the fundamental principles of justice, could justify the conclusion that the liability of an insurance company upon a policy of insurance upon the life of a living being might be avoided by the existence or concealment of a fact not within the knowledge of the person seeking for the same.

Second. But we maintain that the question is too general and all-embracing to admit of a possible answer. It embraces not only the entire life and personal history of the applicant, but the lives and history of his ancestors, and submits the question to his judgment, and demands of him an answer at his peril. What fact could there be, apart from the 113 inquiries which preceded the question under discussion in the application for the policy, which could increase the insurance or the risk upon the life of the applicant? Many matters suggest themselves, and we shall specify a few for the sake of illustration. Would it be contended that the question required a disclosure of the fact that the applicant was then living and carrying on business under an assumed name, or that he was living in a state of adultery with the wife of another man, or that he kept a mistress, or that twenty years before in a

distant country he had committed a felony, or that he was addicted to the practice of masturbation, or of over-eating, or that in his early youth he had seduced a woman and knew that her father or brothers would, in the event of discovering his guilt in the matter, be certain to execute summary vengeance upon him? All of these things might occur to the mind of a person seeking for insurance. He might well reason to himself: I have already answered 113 questions, giving every particular in regard to the health, pursuits, character, hereditary diseases, length of life and occupation of my ancestors and collateral relatives for two generations, as well as my own; I am at a loss to conjecture what can possibly be left for me to do, and I must say I do not know of anything else upon which I should be able to afford the company the slightest information. Unless, therefore, this Court is prepared to hold that the non-disclosure of events and facts not within the knowledge of the applicant, or of facts as remote from the question of his fitness as a subject for insurance as the fact that he bore a false name, or had committed the offense of seduction twenty years before, or had committed a felony in his youth in a distant country, we cannot imagine how this question could be answered. It is a mere generality, and defeats its purpose. Such a question has never yet been made the subject of judicial construction. It is referred to in the case of *Moulor* vs. *American Life Insurance Co.*, 111 U. S., 335; but the question was not judicially construed.

For these reasons we insist that the question itself is void for generality and uncertainty, and that it cannot with safety be answered by any applicant for insurance.

It is a drag-net thrown out by the company, in issuing its policy, to bring up from the depths of the past some excuse to evade the payment of a just obligation. A policy or application containing any such provision should instantly be declined by any applicant for insurance.

Third. But under any circumstances, we contend that the statement in general terms that no fact exists with which the company ought to be made acquainted is not a warranty, but a *concealment;* and that a concealment must be of a material fact, and in this respect differs from a warranty. In this view of the case the Court was right in submitting the question of the materiality of the fact alleged to have been concealed to the jury.

Fourth. Lastly, we contend that the instruction was totally abstract, and should have been refused, and that there was no evidence in the case rendering such an instruction necessary or proper. The defense had entirely failed on the issue of fraudulent concealment of threats alleged to have been made against the life of McWhirter prior to his application for the policies in question. We do not care to repeat on this point the testimony of Lane and Bates and J. E. Baker, to which we have hitherto referred. Each and all referred to threats and apprehensions of danger which had their origin from three to six months after the making of the applications for the policies in question. The assumption that McWhirter procured insurance to the extent of $60,000 upon his life under the influence of these threats and apprehensions is without foundation. The policies sued

upon in this action were *the first two obtained by McWhirter*, and they constituted an amount no greater than a moderate provision for his family in case of death. There being no proof whatever that the threats against, or apprehensions of violence upon the part of McWhirter, existed or were brought to his knowledge prior or at the time of the making of the applications for the policies of insurance, its refusal of the instruction in question, if erroneous, was without injury to the plaintiff in error, and is therefore no ground of reversal; but on this point, as on others to which we have previously called the attention of the Court, the present position of the counsel for the plaintiff in error is strangely at variance with their line of defense as exhibited in the pleadings in this action. The answer of the defendant in this respect is as follows (Trans., p. 36):

"The said McWhirter, prior to the making of said application for insurance in the defendant corporation, had difficulties of a personal nature in the said county of Fresno with certain persons to the defendant unknown, and in said difficulties the said persons had threatened to murder the said McWhirter whenever and as soon as opportunity offered therefor. *That said threats were believed by said McWhirter, and that said McWhirter greatly feared by reason of said threats and his belief therein, that his, said McWhirter's, life was in great and immediate danger from said persons, and acting upon such belief, and solely by reason thereof, the said McWhirter made the said application.*"

The necessary implication of the answer in this respect, which is the same in regard to both policies, is that

the threats existed prior to the application for the policies respectively, and that McWhirter knew of the same.

We decline to follow counsel for plaintiff in error in his lengthy examination of the authorities upon the nature of a warranty and the necessary and inevitable legal consequence of a breach of such warranty on the part of the insured. It may be conceded, for the sake of the argument, that a breach of warranty affords a just and perfect defense to the insurer. This discussion, in our opinion, is totally apart from the question. We have preferred to place the argument upon the following grounds:

First. That, by the terms of the application and the policy, the immediate matter under discussion does not constitute a warranty pure and simple in the sense that a breach of the same would constitute a perfect defense.

Second. That the matters inquired of are matters of opinion and moral obligation, upon which a warranty and its legal consequences cannot be predicated.

Third. That the conduct of the insured in the application was, if anything, a concealment, which must be a concealment of a material fact.

Fourth. That the Court was justified in submitting the question of materiality, with appropriate instructions, to the jury to determine that question, to the jury itself.

Fifth. That there was no evidence upon which the instructions could be reasonably predicated, either that the fact complained of existed, or that McWhirter knew of the same before or at the time of making the application for the policy, and that, in the last point of view, the error, if any, was totally without injury.

VII.

The defendant's next point is that the Court in effect withdrew from the consideration of the jury the questions of breach of warranty and fraudulent concealment, and submitted to it only the question of suicide. This is a far-fetched and unnecessary conclusion from the language of the Court in its charge. The Court in its charge (Trans., p. 293), instructed the jury as follows:

"You are further instructed that the entire theory of defense in this case is based upon the assumption that Louis B. McWhirter prepared the clubs and the mask found upon his premises shortly after the killing; that six and only six shots were fired on that occasion; that five and only five were fired on to the fences and outhouses upon the premises; and that McWhirter fired the sixth into his own body and through his own heart, which caused his death. This theory of defense is founded upon the allegation that McWhirter prepared the surroundings to indicate a sham assassination, or scene of murder, and then killed himself. If you should find that Louis B. McWhirter did not make such preparations; that he did not saw the club found upon his premises; that he did not prepare the mask; that he did not own or possess both pistols; and that he did not fire all the shots, the bullet holes of which are found in the fence and outhouses and on his own body, your verdict should be for the plaintiff."

In all of the extracts from the charge of the Court, given on page 31 of the brief of the counsel for plaintiff in error, the portions quoted are detached from the context, but, when taken together, they all show that the remarks

of the Court in the language complained of were necessarily *confined to the immediate issue and defense under discussion.* The instruction, as quoted, that if McWhirter was killed by accident the plaintiff is entitled to recover, necessarily means that the plaintiff is entitled to recover *upon the issue and defense of suicide.* Again, that portion of the charge of the Court, quoted by counsel on the other side, to the effect that the entire theory of defense in this case is based upon the assumption that McWhirter prepared the clubs and the masks found upon his premises shortly after the killing, etc., must necessarily be construed to mean that the entire theory of the defense then being explained by the Court to the jury, to wit: that of suicide, was based on that assumption; and the concluding clause of the paragraph of the charge quoted to the effect that "your verdict should be for the plaintiff," could mean nothing more than that their verdict should be for the plaintiff upon the issue under discussion, to wit: suicide. Any other construction of the charge of the Court is partial, carping and unfair.

VIII.

The next error alleged by counsel is the refusal of the Court to give to the jury Instruction XI, found on page 300 of the transcript. The same was properly refused, for the reasons above given, and because it omits the necessary qualification and limitation that McWhirter had any knowledge of the threats, or was under any appehension in regard to the same, at the time of the applications for insurance and the delivery of the policies which form the subject of this action. Another sufficient

reason for the refusal of the instruction was the fact that there was no proof that any threats of the kind complained of had been made until several months subsequent to the making of the applications.

IX.

The last point made by counsel for plaintiff in error relates to the refusal of the Court to give Instruction XIII, found on page 301 of the transcript. The instruction was properly refused, for the reasons advanced under our seventh and eighth points, and for the further reason that there was no proof whatever that McWhirter had had difficulties with certain persons who threatened his life, and that he was then apprehensive of assassination. The only difficulty of a personal nature of which there is any evidence was the unprovoked assault upon him by one Clem. Carroll, which was testified to by the witnesses Lyons and Meares. (Trans., pp. 279, 280, 281). This assault took place in the first week in May, 1892, which was six months and two months respectively after the execution of the policies in question.

It is respectfully submitted that the judgment should be affirmed.

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